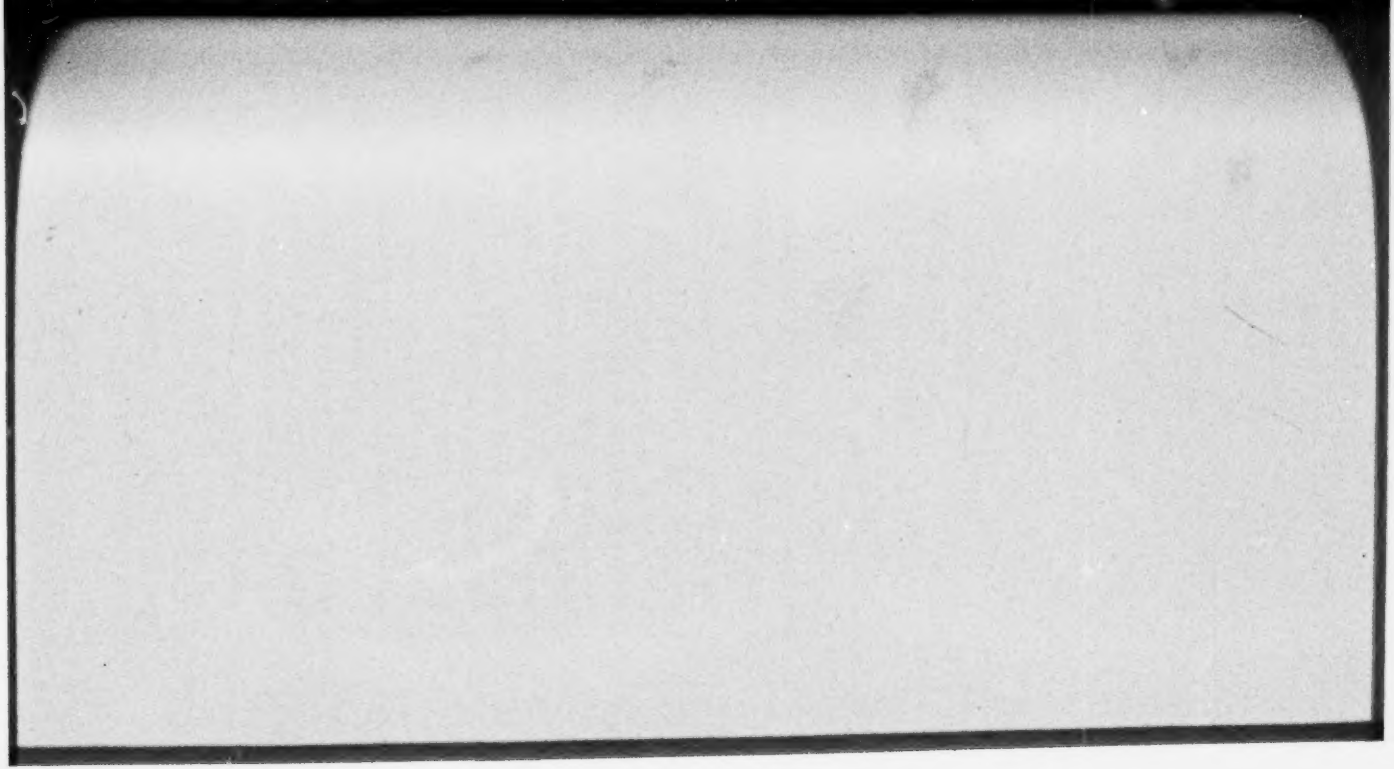

Brf. of Wetmore & Coe for Respondent

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Supreme Court U. S.
FILED
MAR 19 1900
JAMES H. McKENNEY,
Clerk.

Filed Mar. 19, 1900.

EMILIE SAXLEHNER, PETITIONER,

vs.

EISNER & MENDELSON COMPANY.

No. 212.

EMILIE SAXLEHNER, PETITIONER,

vs.

SIEGEL-COOPER COMPANY.

No. 213.

EMILIE SAXLEHNER, PETITIONER,

vs.

RUDOLPH GIES.

No. 214.

EMILIE SAXLEHNER, PETITIONER,

vs.

LOUIS MARQUET.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

EDMUND WETMORE,
CHARLES G. COE,
Of Counsel for Respondent.

18988-John Polhemus Printing Company, 121 Fulton Street, N. Y.

Supreme Court of the United States.

EMILIE SAXLEHNER,
Petitioner,

against

EISNER & MENDELSON COMPANY,
Respondent.

The United States Court of Appeals for the Second Circuit dismissed the Bill of Complaint in the above cause, and the Bills of Complaint in the subsidiary causes referred to in the Brief of Petitioner, on the ground that undisputed facts showed such a delay of nearly nine years on the part of complainant in bringing suit, accompanied with such acts of surrender and acquiescence as to bar the right to injunctive relief.

THE APOLLINARIS CONTRACT.

The first fact to which we call the attention of this Court, and which is dwelt upon by the Court of Appeals as one of the circumstances accompanying the long continued delay which led the Court to its decision, is the contract made between the Apollinaris Company, Limited, with the predecessor of the complainant, and the agreements and actions of both parties connected therewith.

On February 8th, 1876, a contract was entered into between Andreas Saxlehner, the predecessor of complainant, and the Apollinaris Company,

Limited, by which contract said company was granted the sole and exclusive right to sell the waters of the Hunyadi Janos Springs in all parts of the world except the continent of Europe and Smyrna.

In the exact language of the contract, Saxlehner "abandons" to the Apollinaris Company the exclusive sale of his Hunyadi Janos water within the prescribed territory.

By this contract it was further provided that Saxlehner was bound to refuse all orders for the Hunyadi Janos bitter water which he knew, or had good reason to suppose, were intended for places reserved for the Company by the said contract, and make over the same to the Company.

On its part the Company agreed not to introduce any other bitter water during the period of the contract. It was further agreed in said contract that the Company should buy a specified number of bottles yearly, which Saxlehner agreed to sell at a specified price.

This contract was originally made for the term of ten years, beginning the first of January, 1876.

The parties proceeded under this original agreement for about a year, evidently to their mutual satisfaction, since on or about February 15th, 1877, the term of said contract was extended to fifteen years from January 1st, 1886—that is to say, substantially for the period of twenty-five years from February 8, 1876.

The contract further provided that the Apollinaris Company might terminate the same at any time during this period by giving twelve months previous notice. Saxlehner had no such right, so that the sole power to terminate the contract, prior to the expiration of its term, was given exclusively to the Apollinaris Company (Record, pp. 237–240).

Such notice was given in the month of March, 1895, by the Apollinaris Company, and in pursuance of said notice, the contract terminated on March 25, 1896.

Almost simultaneously with the making of this agreement, Saxlehner and the Apollinaris Company agreed to print the labels on the bottles which were sold to the Company in red and blue colors, instead of in red and white as Saxlehner used them on the continent of Europe.

In order to give all persons interested and the public generally, notice of the rights of the Apollinaris Company, the following notices were placed upon the labels: "Sole Exporters: The Apollinaris "Company, Limited, London." And also the following:

"Imitation of this water, or of the label, or of the "capsule, will be the sublect to legal proceedings at "the instance of the Apollinaris Company, Limited, "19 Regent street, London.

"ANDREAS SAXLEHNER."

The evidence shows that on each and every bottle furnished by Saxlehner to the Apollinaris Company, labels were affixed at Budapest, having the words above quoted thereon (Record, pp. 215–216).

For the purpose of still protecting the sale and right of the Apollinaris Company to the label and name, such label with the said words thereon was registered, and a trade-mark obtained for the name, "Hunyadi Janos" by Saxlehner in the United States, on September 11, 1877. (Record, p. 616).

It is further shown by the evidence that prior to the Apollinaris contract of 1876, the sales of Hunyadi Janos water in the United States were trivial, and such water was substantially unknown here. The water was introduced and made known to the people of the United States by the Apollinaris Company, all the expenses of such introduction and marketing being borne by the Company.

It is further shown that the said Hunyadi Janos water was extensively and exclusively advertised by the Apollinaris Company during the period of the contract at its own cost and without expense to Saxlehner.

Under these circumstances, it may well be held that it was the intention and design of both parties to the contract, that such contract and the agreements connected therewith, delegated to the Apollinaris Company all the powers, and vested such Company with all the rights in the prescribed territory for the period of the contract, which Saxlehner would have had if such contract had not been made, and which powers and rights he reserved to himself in his own territory.

If such be the interpretation of the contract, then the Apollinaris Company stood for Saxlehner, and was a principal in said territory for the period of the contract, and its action and failure to act were the action and non-action of Saxlehner. If, on the other hand, it be held, as the complainant strenuously contended, that the relations of the Apollinaris Company and Saxlehner during the period of the contract were those of vendee and vendor, then, as the Court of Appeals says, Saxlehner was bound to know the situation in the United States with regard to the sale of Hunyadi water, and is chargeable alike with the actions and conduct and failure to act of the Apollinaris Company. In the one case, the Apollinaris Company was the principal for the period of the contract, and thus its action or non-action was Saxlehner's action or non-action, and in the other, Saxlehner was chargeable with the knowledge of what her vendee was doing or not doing in the United States.

It is obvious, that whatever the precise legal relations of the parties to the contract were, the Apollinaris Company was held out to dealers in mineral waters, all persons interested in the sale of Hungarian bitter waters, and the public generally, as the sole representative of Saxlehner in the United States, as the suppressor of infringements, and the only person with whom any one could deal during the period of the contract.

Origin of the name "Hunyadi" in the United States, and its use prior to 1888, when the right thereto was lost by acquiescence.

In the year 1887 the Apollinaris Company brought an action in the Supreme Court of New York against one Andres, for infringement of the name "Hunyadi," and the use of the red and *white* label, a similar suit being brought against Joseph Ungar for the use of said name, in connection with the red and *blue* label. In the Andres' suit, the defendant used the designation "Hunyadi Matyas," and in the Ungar suit, the designation "Hunyadi Arpad." Injunctions were obtained in both suits, and in 1888, on affidavits being filed in the Ungar suit and motion made to vacate the injunction, the injunctions in both suits were vacated and the suits themselves discontinued and abandoned.

The proceedings in these cases are set forth at length in the Record from 564 to 597.

These proceedings clearly show that the Apollinaris Company was granted and exercised the sole and exclusive right to sell, the absolute right to conduct the business of selling in its own way, uncontrolled in any respect by Saxlehner, the sole and exclusive right to the use of the trade-mark "Hunyadi Janos," and the label by and under which the water was sold, the sole and exclusive right to sue for infringements and, as necessarily incident thereto, the sole and exclusive right to the proceeds of any suits brought, whether by way of accounting or damages, and the sole and exclusive right to compromise, settle or discontinue such suits in any way the Company deemed advisable.

The proceedings in these suits further show that the name "Hunyadi" originated in the United States from the sale of the "Hunyadi Janos" water by the Apollinaris Company and its exertions to

introduce and market such water, and was not dependent on a technical trade-mark.

The facts set forth by the complaint in the Andres' suit and the proceedings in both suits, are especially valuable, because they occurred prior to the period when the exclusive rights to the label and trade-mark were lost, as hereinafter set forth, and when the Apollinaris Company had been exercising its exclusive rights under the contract for the period of about ten years.

The said complaint, after showing that the name originated by Andreas Saxlehner and used in Hungary was "Hunyadi Janos" (not "Hunyadi") proceeds to say as follows with regard to the label:

"That pursuant to said sale and grant, and to "regulate and protect the respective rights of the "parties thereto, a label for use in the United "States was devised and adopted, showing the "words 'Hunyadi Janos,' and also certain designs. "That said label has, at all times since the adop"tion thereof, been affixed to every bottle of said "water taken from said spring by or for the said "plaintiff, and transported to and sold in the "United States, and the following words in the "English language appear thereon: 'Sole Export"'ers: The Apollinaris Company, Limited, Lon"'don.'" And also the following:

"'Imitation of this water or of the label or of the "'capsule will be the subject of legal proceedings "'the instance of the Apollinaris Company, Limited, "'19 Regent street, London.'"

"*And the said Saxlehner, for the purposes above "stated, and especially for the purpose of giving "notice to the world of said grant, caused to be "registered in the Patent Office at Washington, "District of Columbia, the description and char"acteristic part of the said label affixed and adopt"ed as aforesaid, containing, among other things, "the said trade-mark 'Hunyadi Janos,' and the "words last above quoted.*" Record, pp. 567–578.

The trade-mark so referred to was registered, as we have stated above on September 11, 1877. As is seen both by the above statement and the trade-mark itself (p. 616), no claim was made to the word "Hunyadi" in and of itself, and such trade-mark gave notice to everyone on *the face of the label*, that the Apollinaris Company had the sole and exclusive right to the use of such *red and blue* label, was the sole and exclusive seller of the "Hunyadi Janos" water, and was given the right to sue for infringements. These facts are also most important because they negative completely the claim made in the brief of petitioner, that the contractual relations of Saxlehner and the Apollinaris were secret, and therefore no one could have relied on the acts of the Apollinaris Company as binding on Saxlehner. On the contrary, this 1877 trade-mark, which is set forth in petitioner's brief as the original basis of Saxlehner's rights in the United States, also gives notice "to the world" of the sole and exclusive rights of the Apollinaris Company to the trade-mark, label and water, and holds such company forth as the only firm to deal with, or interested in the matter. Such notice, as we have seen, also appeared on every bottle of "Hunyadi Janos" water sold in the United States from March 25, 1876, until March 25, 1896, when the Apollinaris contract terminated, not at the instance of Saxlehner, but at the instance of the Apollinaris Company. The Andres' complaint then goes on to state as follows, with regard to the introduction and sale of "Hunyadi Janos" water in the United States and the way in which the name "Hunyadi" came to be used here as designating "Hunyadi Janos" water:

"That previous to the said sale and the said grant "the said mineral water was comparatively but little "known in the United States, and was first generally "introduced therein and sold in large quantities by "the said plaintiff after said grant, and upwards of "nine years ago. That through the efforts, expendi-"tures and investments of the said plaintiff, the

"said water has become widely known in the United "States, and is at present sold therein by it and its "vendees in very large quantities.

"That by reason of the said sales by it, and the "said words upon the said label by it adopted as "aforesaid, dealers in mineral waters and the pur- "chasers and consumers of said waters generally, "have come to know, and have long known, that "the said plaintiff has the exclusive right in said "United States to furnish and sell the said mineral "water under the said trade-mark 'Hunyadi Janos,' "and under the said label.

"*That said water so sold has come generally to* "*be known and designated by the trade so called,* "*and by purchasers and consumers, by the first* "*and characteristic word of said trade-mark* "*'Hunyadi' the 'Janos' being comparatively* "*seldom used in common parlance.*"

It is thus plain, that the word "Hunyadi" was no technical trade-name, that it was not originally claimed by Saxlehner in his 1877 trade-mark, and that it's use as a designation of the "Hunyadi Janos" water arose in the United States not from any acts or conduct of Saxlehner, but solely from the acts and exertions of the Apollinaris Company in introducing and making known the water to the American public, and by trade usage and custom alone.

The above history of the origin of the word "Hunyadi" and its use in the United States as a designation for "Hunyadi Janos" water is substantially corroborated by the statements of the Bill of Complaint in the present suit.

The whole theory of the right of the complainant to the red and blue labels exhibiting the words "Hunyadi Janos," and to the bottles and capsules in and under which she now sells Hunyadi Janos water in the United States, is based solely on the claimed use of substantially the same label, bottles and capsules by the Apollinaris Company during the twenty years of its contract from 1876 to 1896.

Such red and blue label, as stated in section eight of the bill of the complaint herein, was especially devised to be used by the Apollinaris Company in the United States. Such label was not used by complainant's predecessor at all, and is not now used by complainant in Hungary.

It was through this label alone and by its use by the Apollinaris Company that the Hunyadi Janos water became known in the United States, as substantially stated in section nine of the Bill of Complaint herein, and it is only by and through its use by the Apollinaris Company, acting as and for Saxlehner during the twenty years of the contract, that the complainant now claims any rights at all to the label and name "Hunyadi Janos."

In the 13th section of the Bill of Complaint, such representative capacity of the Apollinaris Company is expressly recognized (Record p. 3).

The complaint there especially refers to the sale of Hunyadi Janos water in the United States, designating the Appollinaris Company as "*your Orators' Agents, as aforesaid.*"

It is apparent, therefore, that the complainant founds all her alleged rights to the label and to the word "Hunyadi," on the use by the Apollinaris Company, as her representative, of such label and word in the United States during the twenty years of the contract.

How, then, can the complainant repudiate the acts and conduct of the Apollinaris Company during the continuance of the contract, by which the defendant proves abandonment, surrender and acquiescence?

If the continuance of the use of the red and blue label by the Apollinaris Company as the representative of Saxlehner is relied on by the complainant to maintain her rights, how can she be heard to say that said Company was her representative to maintain only, and to disown such Company and repudiate the acts and course of conduct, on which defendant relies to prove that the use of the word

"Hunyadi" was not exclusive, and that the exclusive right to the red and blue label had been abandoned and its use by the defendant and the entire trade for nine years acquiesced in!

It is impossible to conceive of any more effective words or means or acts by which one party could give to another the sole and exclusive right to a business and the good-will of such business, and the label and trade-mark by which such good-will and business was evidenced. It is idle, therefore, for the complainant to contend, in view of these facts, that the acts of the Apollinaris Company, with reference to the business trade-mark and label which we shall set forth hereafter, did not bind Andreas Saxlehner and his successor, the complainant herein.

The adoption and use by the Eisner & Mendelson Company of the name "Hunyadi Matyas" and the red and blue label not fraudulent.

It is insisted by the Petitioner's Counsel that the red and blue label bearing the name of Hunyadi Matyas was deliberately adopted by the predecessor of the defendant corporation for purposes of fraud, and the counsel refer to a statement of Judge Shipman, to the effect that Mr. Eisner, the President of the Eisner & Mendelson Company intentionally simulated the Saxlehner United States label. This finding was not endorsed by the Court of Appeals, which only says, that "in 1890, the Eisner & Mendel-
"son Company began the sale of Hunyadi Matyas
"Water under labels closely simulating complain-
"ant's, and vigorously pressed the sale of it."

In order to make the acts fraudulent, it must be shown that the complainant had sole and exclusive rights in 1890 to the name "Hunyadi" and the red and blue label, and it can readily be seen that at the time when the Eisner & Mendelson Company went into the business of selling the Hunyadi Matyas

Water in the United States, Saxlehner had no such exclusive rights.

The defendant, the Eisner & Mendelson Company, is a West Virginia corporation, organized on or about April 13th, 1892, by the reorganization of its predecessor, a Pennsylvania corporation of the same name, organized in or about the year 1886.

The present West Viginia corporation succeeded to all the rights, contracts and liabilities of its predecessor, the Pennsylvania corporation, and commenced and has continued to do business under substantially the same officers and management, and in charge of the same interests.

The present corporation and its predecessor was, and is, the agent for the celebrated Carlsbad Sprudel Mineral Water and the salts derived therefrom, and also of the well-known proprietary preparation, Johann Hoff Malt Extract. Such corporations were also and are well known as mineral water dealers. (Record, p. 313.)

In the year 1889, the Eisner & Mendelson Company of Pennsylvania made a contract with Mattoni & Wille, the owners of the Hunyadi Matyas springs at Buda Pest in Hungary, a translation of which is set forth at page 550 of Record. This 1889 contract was preliminary to and was superseded by the 1890 lease, which is set forth at page 552 of Record, by which the Eisner & Mendelson Company leased one of the Mattoni & Wille Hunyadi Springs, called "Hunyadi Matyas Spring No. 2." This contract was entered into in the spring of 1890, and was to continue for five years, with the privilege of extension for twenty years if the Eisner & Mendelson Company gave notice of its desire to do so by the first day of June, 1895. At the time of entering into this contract, Mr. Eisner had made an investigation into the state of the Hunyadi Mineral Water business both at Buda Pest, Hungary, and in this country, and knew that substantially the state of facts both in Hungary and the United States as to the sale of Hunyadi was as follows:

First: In the year 1890 the word "Hunyadi" in Hungary, the country of its origin, instead of exclusively designating the Hunyadi Janos Springs, was used, under the sanction of the proper authorities, and by their express grant and license, to designate several springs situated in the neighborhood of Buda Pest, and the word by that time had become a generic term in the country.

As early as 1873, one Ignatius Markus applied to the Town Council of Buda Pest for leave to call a certain spring within the limits of that city "Hunyadi Matyas Medical Spring." Andreas Saxlehner, the owner of the Hunyadi Janos Spring, complained or objected to the Council that his claim to the exclusive right to the words "Hunyadi Janos" would be invaded by such a designation, and on Saxlehner's protest, the said Council decided in his favor. Markus then appealed to the Royal Hungarian Minister of Agriculture, Industry and Commerce, and such ministry reversed the decision of the Town Council, and decided that Markus had the right to call the spring "Hunyadi Matyas," on the ground that the name "Hunyadi Janos" and "Hunyadi Matyas" represented two quite different names, which might exist without any infringement of each other. (Record, p. 549.)

In 1877 Mattoni & Wille registered the said name "Hunyadi Matyas" as a designation of their springs situated in the city limits of Buda Pest, having acquired the ownership of the Markus Spring. In the fall of 1880 Ignatius Ungar obtained the privilege under the Hungarian laws to designate his Hungarian Aperient Spring, in the neighborhood of Buda Pest, under the name of "Hunyadi Arpad."

By the year 1886 there were five springs in the neighborhood of Buda Pest, all designated by the name "Hunyadi," viz: "Hunyadi Janos," "Hunyadi Arpad," "Hunyadi Laszlo," "Hunyadi Erzebet," and "Hunyadi Matyas." The waters of these springs were not only sold in Hungary under the said names, but also were sold in bottles and cap-

sules, similar to the Hunyadi Janos bottles and capsules, and under similar labels; such labels all have three divisions with a red central panel and medallion head thereon, with two white side panels or wings. (Record, pp. 579, 585, 592.)

Therefore, beginning with the year 1873, these various aperient springs in the neighborhood of Buda Pest, having similar constituents, were all selling under these names and labels. For several years prior to 1886 this had been going on, and the said name "Hunyadi," had thereby become generic and known, not as designating the Hunyadi Janos springs alone, but as designating this group of aperient springs in the city limits of Buda Pest. A specimen of the "Hunyadi Matyas" label, which Mattoni & Wille had been using to designate the waters of their group of springs, called "Hunyadi Matyas," is shown at page 39 of Defendant's Scrap Book. The label used since 1880 by Ungar to designate his spring or springs called "Hunyadi Arpad," is shown at page 29 of Defendant's Scrap Book. The label used by the owners of the "Hunyadi Laszlo" spring in the neighborhood of Buda Pest is shown at page 57 of the Defendant's Scrap Book.

All these springs, as testified to by Mr. Eisner, were selling in competition with each other and with the "Hunyadi Janos" water under these red and white labels, and with similar bottles and capsules; and the name "Hunyadi" was common to the said five springs, "Hunyadi Janos," Hunyadi Arpad," "Hunyadi Laszlo," "Hunyadi Erzebet" and "Hunyadi Matyas."

Second.—In the United States, the Apollinaris Company (which company had been given the sole and exclusive right to sell Hunyadi Janos water there, and the sole and exclusive right to the words "Hunyadi Janos," and to the red and blue label adopted by the express consent of Saxlehner to distinguish and define the rights and territory granted

to the Apollinaris Company from the rights and territory reserved to himself) had, in the year 1887, brought suit and obtained injunctions restraining the use of the words "Hunyadi Matyas" and "Hunyadi Arpad" and the use of the "Hunyadi Arpad" red and blue label, and the use of the "Hunyadi Matyas" red and white label, and after retaining such injunctions for over a year had voluntarily dissolved the said injunctions, and discontinued and abandoned the said suits, and such exclusive right to the word "Hunyadi" and the said labels, whether in red and white or red and blue colors.

Thereafter and since the termination of such litigation and up to the time in 1890 when the Eisner and Mendelson Company entered the field to sell Hunyadi Matyas water, Hunyadi Arpad, Hunyadi Bela and Hunyadi Laszlo waters had been freely sold with the knowledge and the consent of the Apollinaris Company under the red and blue three-panel labels, in bottles and with capsules similar to those used by said company in selling Hunyadi Janos water.

The sales of the Hunyadi Arpad water had been especially large, amounting from the time the injunctions were vacated in 1888 to the time in 1890 when the Eisner & Mendelson Company entered into the Hunyadi Matyas business to between Three Hundred and Fifty to Four Hundred Thousand bottles. Record, p. 539.

Third.—The above being the state of the market with regard to the sale of the Hunyadi waters in the United States, in the Spring of 1889, the Apollinaris Company published an advertisement in the "Medical Record" of April 6th, 1889 (page 12, Defendant's Scrap Book), and continued to publish the same in further issues of the same periodical during the years 1889 and 1890. This advertisement is also printed in Record, at page 612. The advertisement reads as follows:

"The Apollinaris Company, Limited, London,
"beg to announce that, as numerous Aperient
"Waters are offered to the public under names of
"which the word 'Hunyadi' forms a part, they
"have now adopted an additional label comprising
"their Registered Trade Mark of selection, which
"consists of

"A RED DIAMOND.

"This label will henceforth also serve to distin-
"guish the Hungarian Aperient Water sold by the
"Company from all other Aperient Waters."

From this time on until the termination of the Apollinaris contract in 1896, as is admitted by the complainant, this diamond mark was invariably placed by the Apollinaris Company, on the Hunyadi Janos label, to thereafter distinguish the Hunyadi Janos water from all other aperient waters. This act of the Apollinaris Company in so distinguishing the Hunyadi Janos water from the other Hunyadi waters shows that not only to the knowledge of the said Company, were the Hunyadi Arpad, Hunyadi Bela and Hunyadi Laszlo waters on the market, all known under the generic term "Hunyadi," but also that, by the use of the diamond mark thereafter, the Company admitted that it not only made no claim to the exclusive right to the red and blue label devised in 1877 to protect the rights of the Company in the United States, but acknowledged that such red and blue label, as well as the word "Hunyadi," was the common property of the mineral water trade in the United States.

The abandonment of the Hunyadi Matyas and Hunyadi Arpad suits and injunctions in 1888 by the Apollinaris Company, the free sale thereafter of the Hunyadi Arpad, Hunyadi Laszlo and Hunyadi Bela bitter waters, all using the red and blue label, the adoption and the use for several years prior to 1890 by the Apollinaris Company of its red diamond mark to distingush the Hunyadi Janos water from

the other Hunyadi waters, and the announcement April 6th, 1889, and thereafter in the years 1889 and 1890, that the red diamond mark had been adopted for this purpose, are all facts on which the Eisner & Mendelson Company had a right to rely in the adoption and use of the Hunyadi Matyas label, and negative any idea of fraudulent intent on its part.

Fourth. There is another fact showing that there was no intent to clandestinely imitate the Hunyadi Janos label which is set forth in the record.

Mr. Joseph Mendelson, who was the Treasurer and one of the managers of the Pennsylvania Eisner and Mendelson corporation, states that in the year 1890, prior to the 1890 Mattoni and Wille lease, he called at the office of the Apollinaris Company in London, and saw Mr. Steinkopff, the President of the said Company, and notified him that the Eisner & Mendelson Company was about to go into the Hunyadi Matyas business in the United States, and had a conversation with reference thereto, and as to whether a friendly combination as to prices could not be formed. Mr. Steinkopff made no objection or protest to the Eisner & Mendelson Company entering into the business of selling Hunyadi Matyas water in the United States, but refused to enter into any combination, substantially on the ground that there were other Hunyadi waters in the market, and that, therefore, no arrangement of the kind would interest him (Record, pp. 692 to 694.)

This conversation shows that the officials of the Eisner & Mendelson Company before definitely closing their contract with Mattoni, gave direct and personal notice to the Apollinaris Company of their intention to sell Hunyadi Matyas water in the United States, and that the Apollinaris Company made no protest to such proposed action. This fact also negatives the idea of any fraudulent intent on the part of the Eisner & Mendelson Company to gain a portion of the good-will of the Hunyadi Janos business, since before entering into their new arrange-

ment with Mattoni, the officials of the Company were careful to ascertain that the Apollinaris Company, the only party having any rights in the matter, had no objections or protests to make.

This being the situation of the Hunyadi mineral water business in the United States in the spring of 1890, the Eisner & Mendelson Company entered into the business in reliance on this state of facts and situation, and, as lessee of the water of the said Hunyadi Matyas Spring, took steps to introduce such water to the people of the United States.

The steps taken to introduce the Hunyadi Matyas water to the people of the United States by the Eisner & Mendelson Company as lessee of the owner of the Hunyadi Matyas Spring are given in detail by Mr. Eisner from pages 320 to 329 of Record. This testimony shows that at the beginning of May, 1890, said company sent a circular letter to the drug and mineral water trade throughout the United States, notifying them to the effect that the said Company was the lessee of this spring, and enclosed a circular showing the label of the Hunyadi Matyas water as the said Company imported and sold it. Another circular like this first circular was then sent to the entire retail drug trade of the United States in towns over five thousand inhabitants, some forty or fifty thousand of such circulars being sent out; the first circular or notice being sent especially to the jobbing trade and mineral water dealers in general, and the second notice being sent out to retail drug trade. Specimens of these notices and circulars are set forth at pages 19 and 20 of Defendant's Scrap Book.

At or about the same time a special notice was sent out to doctors and physicians of the United States in nearly all of the large cities of the country, enclosing a pamphlet like the colored Hunyadi Matyas label circular, showing substantially the Hunyadi Matyas label. Such letter sent to physicians is shown at page 22 of Defendant's Scrap Book.

During the years 1890, 1891 and 1892 a large num-

ber of these notices were distributed to physicians and some ten thousand sample bottles of the Hunyadi Matyas water with the regular Hunyadi Matyas label on them were distributed to physicians.

Notices were also inserted in some 150 of the prominent papers of the United States in which the Eisner & Mendelson Company were at that time advertising, to the effect that they were entering on the business of selling Hunyadi Matyas water in the United States, and specimens of such notices are shown at pages 17 and 21 of the Defendant's Scrap Book. Mr. Eisner's testimony with regard to general advertising in trade periodicals and papers of the Hunyadi Matyas water as sold by the Eisner & Mendelson Company, is found at pages 505 to 516 of the Record, and specimens of such advertising and the periodicals in which they were inserted are verified by Mr. Lissner, in his testimony on the part of the defendant, at pages 745 to 751 of Record. Lists of periodicals and the issues of such periodicals and trade journals in which such notices were inserted and specimens of such advertisements are shown at pages 5, 6, 9, 10, 15, 16, 18 and 26 of Defendant's Scrap Book.

The Apollinaris 1892 Protest, and its Significance and Legal Effect.

The Eisner & Mendelson Company thus introduced and sold the Hunyadi Matyas water in the United States without objection, protest or interference on the part of the Apollinaris Company during the years 1890, 1891 and 1892, when in the spring of that year occurred the sole and only objection on the part of said Company to any of the acts of the defendant company.

This is referred to by Judge Shipman in his Circuit Court decision, as follows:

"The Apollinaris Company, during the continu-
"ance of its Saxlehner contract, did not object to
"the Eisner & Mendelson Company's operations

"or trade-marks, or representations, except in one "particular, which was changed at the former'r re- "quest."

The circumstances under which this protest occurred, and what was done by the Eisner & Mendelson Company in relation to it, are set forth at pages 553 to 556 of the Record, and the matter is explained in detail.

Mr. Eisner states that commencing with the year 1890, and running on through the years 1891 and 1892, the Eisner & Mendelson Company sent out special trade advertisements or mailing slips, specimens of which are found at page 24 of defendant's Scrap Book. These mailing slips show on one side a fac-smile in miniature of the Hunyadi Matyas label in colors, and on the reverse side a picture showing approximately the situation of the Hunyadi Janos, the Hunyadi Arpad and the Hunyadi Matyas springs, these being the principal Hunyadi waters at Buda Pest.

This reverse side of the mailing slip also shows a comparative analysis of the Hunyadi Janos, Hunyadi Matyas and Hunyadi Arpad springs, and it was this comparative analysis which led to the protest referred to.

The testimony shows that these mailing slips were sent broadcast to the trade throughout the country, and this widespread publicity attracted the attention of Isidor Haldenstein, who was the representative of the Apollinaris Company in the United States, and who, it is admitted, had full right and power to bind the Apollinaris Company by his actions.

In the early part of the year 1892, or about that time, he called at the office of the Eisner & Mendelson Company in New York City, and had an interview with Mr. Eisner. He had one of the mailing slips with him, and, while making no protest or objection to the front of the mailing slip, which showed an exact fac-simile in miniature and in colors of the Hunyadi Matyas label, objected to the comparative analysis on the reverse side, on the

ground that it was unfair to the Apollinaris Company. Mr. Eisner, on behalf of the Eisner & Mendelson Company, said that this should be corrected on the next mailing slips that were issued. This was accordingly done, and, while in these subsequent mailing slips the front side still showed the Hunyadi Matyas miniature label in colors the comparative analysis was eliminated from the reverse side and other matter placed thereon.

Mr. Haldenstein corroborates the testimony of Mr. Eisner with reference to this protest, at pages 541 and 542 of the Record.

It is to be observed, that Mr. Mendelson, in the year 1890, gave full notice to the Apollinaris Company in London, of the intention of the Eisner & Mendelson Company to enter into the Hunyadi Matyas bitter water business, and that for two years prior to this 1892 protest the said Company had been selling the Hunyadi Matyas water under the name "Hunyadi Matyas" and the red and blue label, without any objection or protest on the part of the Apollinaris Company.

We now find that in the year 1892, when the label in colors was circulated to this large extent among the trade, that the only objection made in connection with the circulation of such mailing slips was to the comparative analysis, which was then corrected by the Eisner & Mendelson Company in obedience to the protest.

We, therefore, submit that this protest under the circumstances, its correction by the Eisner & Mendelson Company, and the absence of any other objection or protest to the labels, bottles or capsules, or to the use of the words "Hunyadi Matyas," or to any of the other acts, operations or representations of the Eisner & Mendelson Company in regard to the Hunyadi Matyas water business, form an equitable estoppel on the complainant from now objecting to the use of the words "Hunyadi Matyas," or to the bottles, labels or capsules.

The brief of petitioner criticizes the interview of

Mr. Mendelson above detailed with the President of the Apollinaris Company, on the ground that Mr. Mendelson did not show at such interview the proposed Hunyadi Matyas label the Eisner & Mendelson Company intended to use. This 1892 protest, and the correction of the comparative analysis on the back of the mailing slip, is also important as doing away with any vagueness with regard to the label used by the Eisner & Mendelson Company, and the knowledge of such label and its use by the Apollinaris Company. For two years the Hunyadi Matyas water had been sold in active competition with Hunyadi Janos water, each bottle of said Hunyadi Matyas water having affixed the red and blue Hunyadi Matyas label. The mailing slip showed a colored fac-simile of such red and blue label, bearing on its face the words "Hunyadi Matyas" and the analysis of the water, and on its back, the comparative analysis of the Hunyadi Janos, Hunyadi Arpad and Hunyadi Matyas waters, and we find the Apollinaris Company making no objection whatever to the face of label as shown on the Hunyadi Matyas bottles, but only protesting against the comparative analysis shown on the back of the mailing slip. This was corrected by the Eisner & Mendelson Company, and no protest or objection to the use of the Hunyadi Matyas label was thereafter made by the Apollinaris Company.

The principal reason on which the petitioner appears to rely in alleging fraudulent conduct on the part of the Eisner & Mendelson Company, appears to be that such company changed the color of its label when it entered upon the sale of Hunyadi Matyas water in 1890, ceasing to use the red and *white* label under which it sold the Royal Hungarian bitter water in 1889, and using a red and blue label bearing the words "Hunyadi Matyas."

There is nothing in this change of label, having regard to the Hunyadi situation, both in Hungary and the United States, on which a charge of fraudu-

lent conduct can be founded. The German Royal Hungarian bitter water label, which the American Eisner & Mendelson 1889 label copied in all essential respects, is set forth at page 44 of defendant's scrap book. This label bears on its face the words "Hunyadi Mathias Quelle" as the alternative name of the water, and the evidence shows, as we have seen above, that both the name "Hunyadi" and the red and white and red and blue labels were not in 1890 the sole and exclusive property of Saxlehner, but were generic and common to the mineral water trade both in Hungary and the United States.

Corroborative evidence of this fact, as regards the label, is found in the affidavit of Joseph Ungar, filed on the motion to vacate the 1887 injunction, and on which, with the other papers in the case, the injunction was dissolved in 1888 in the Ungar suit. It is stated as follows in said affidavit (Record p. 581) with regard to the "Hunyadi Janos" labels:

"The form, color and design used in the labels "upon the battles containing the said 'Hunyadi "Janos' water are not used solely to designate the "said 'Hunyadi Janos' water, but are, and have "been for many years, used by the owners and "vendors of various bitter waters in Hungary, and "are recognized and understood by merchants "and consumers as designating the general nature "and quality of the waters coming from all the "bitter water springs of Hungary.

"The said form, color and general design have "been appropriated and used for labels by the "owners of many different Hungarian springs be- "sides the owner of the 'Hunyadi Janos' spring."

With regard to the bottles in which the Hunyadi Matyas water was put up, and their similarity to the Hunyadi Janos bottles, which is alleged as another cause of complaint and alleged badge of fraud, the same affidavit says, as follows, at p. 580 of Record:

"It is true that the bottles containing the 'Hun-"yadi Arpad' water, and those containing the "'Hunyadi Janos' water, are some what similar "in size and shape, and that the capsules upon the "said bottles are made of the same material, almost "all the bottles containing bitter waters coming from "Budapest are obtained at the same factory as "those used by the 'Hunyadi Janos' and 'Hun-"yadi Arpad.' Almost all of the bottles used for "these different bitter waters come from the same "factory, namely the factory owned by one Sie-"mans, and are, therefore, the same in the case of "all these waters.

"There are at least fifteen springs in Buda, Hungary, producing bitter waters, and all of them use for the export trade bottles of the same form, size and general appearance and capsules of the same material and appearance, only with a different stamp impressed thereon."

With reference to the various other alleged fraudulent acts of the Eisner & Mendelson Company, it is sufficient to say that the waters sold by them under their Mattoni & Wille contract could not have been bottled or furnished to them under their Hunyadi Matyas labels at that time, except under the direct authority and sanction of the proper Hungarian authorities.

Under the laws of Hungary no one had the right to sell any spring waters possessing medicinal qualities unless he had first registered the name of the said water in the office of the Royal Hungarian Minister of Agriculture, Industry and Commerce, and obtained a license from the said minister to use the name so registered. (Record, p. 578, 585, 592).

A review of the whole situation shows that in 1890 the Eisner & Mendelson Company entered into the business of selling Hunyadi Matyas water in the United States in good faith, on notice to the Apollinaris Company, and continued to sell it thereafter under the red-and-blue label without any interference, objection or protest (except in the par-

ticular above named) *on the part of the Apollinaris Company, the only person interested in or having the sole right to move in the matter.*

THE APOLLINARIS COMPANY'S ADMISSION IN THE SPRING OF 1893 THAT THE WORD "HUNYADI" IS A GENERIC TERM, AND THE RED DIAMOND MARK AND ITS SIGNIFICANCE.

In the spring of 1893 the Apollinaris Company pointed out and emphasized the fact that the word "Hunyadi" was then, and had become by custom and usage in the United States, to its knowledge, a generic term for Hunyadi or Hungarian bitter waters, by sending out postal cards all over the United States, and by advertising largely in the daily papers throughout the United States, that Hunyadi was a general or generic name for Hungarian bitter waters.

The evidence with regard to this is especially set forth in the testimony of Isidor Haldenstein from pages 534 to 537 of the Record, and the notice itself is printed at 612 and 613 of the Record. Specimens of such notices are also found at pages 37 and 38 of Defendant's Scrap Book. The most important part of this notice reads as follows:

"The word 'Hunyadi' having become a general "name for Hungarian bitter waters, good, bad or "indifferent, the Apollinaris Company affixed to "the bottles of Hunyadi Janos, the Hungarian "bitter water, of which they still have sole sale, a "small Yellow Label with their Red Diamond, the "object of this trade-mark being only to indicate to "the public that the bottle so labelled is sold by the "Apollinaris Company, Limited."

Both the Circuit and Appeal Courts refer to and comment upon this notice as one of the most important facts of the case. Thus the Circuit Court says with regard to it:

"Whatever may have induced the action of the "Apollinaris Company, it did, notwithstanding the "name had become localized here, abandon, in "terms and positively, a claim to a right to its ex- "clusive use and affirmed that it had become in "practice a general name. As the name had become "in fact a trade name in 1886, so, also, it could by "affirmation and positive action cease to be such, "and when it had publicly become open to use by "competitors the persons who invested their money, "in the honest belief that the name was public "property, should have a fair standing in a court "of equity." Record, page 626.

The Court of Appeals says with regard to the same notice:

"In 1889 and again in 1890 that company an- "nounced that it had adopted an additional trade- "mark of selection (a red diamond), which was to "distinguish the Hungarian Aperient Water sold "by it, and that it did so for the reason that "numerous Aperient waters are offered to the pub- "lic under names of which the word 'Hunyadi' "forms a part. In 1893 the Apollinaris Company "issued a further circular in which it stated that: "'The word Hunyadi having become a general "name for Hungarian bitter waters, good, bad and "indifferent, the Apolinaris Company has affixed "to the bottles of Hunyadi Janos water the red "diamond, &c., &c.'" Record, p. 659.

This act of the Apollinaris Company, based upon the fact that all these various Hunyadi waters were in the market at that time, and were selling under the red and blue labels, is most important as a formal acknowledgment to the public of the United States, advertised in the most thorough and complete way, not only at the time, but also, as Mr. Haldenstein testifies, during the year 1893 and the following years, that the Apollinaris Company, as the owner of the Hunyadi Janos business in the

United States and the direct representative of the complainant, had surrendered and abandoned all claim to the word "Hunyadi" and to the red-and-blue label as exclusively identifying the Hunyadi Janos water.

That by this, 1893 notice, the red-and-blue label was abandoned as well the name "Hunyadi," appears by the following statement in the said notice:

"Consumers who desire to secure the Hungarian "Bitter Water sold by the Apollinaris Company are "requested to see that the bottle bears the Red "Diamond."

This announcement practically said to the public: "There are a number of Hungarian bitter waters in "the market which bear the name 'Hunyadi', and "use a red-and-blue label similar to the Hunyadi "Janos label. The word 'Hunyadi' and the red-"and-blue label, therefore, no longer distinguish the "Hunyadi Janos water from the other waters. You "are, consequently, no longer, as you have hereto-"fore, to look for the word 'Hunyadi' and the red-"and-blue label on the Hunyadi Janos bottle as the "distinguishing marks; *but if you wish the real "Hunyadi Janos water, to see in every instance "that the bottles you buy, bear the Red Diamond "mark.*"

That this was the case is plainly shown by the adoption and previous use by the Apollinaris Company of the red diamond mark. The Company commenced to use this mark in or about the year 1887, and in 1888 when the injunctions were dissolved, it was in full and complete use by the Company, and was thereafter invariably used on all bottles of Hunyadi Janos water sold by said Company until the termination of the Apollinaris contract in 1896.

This red diamond mark was used by the Apollinaris Company to distinguish the Hunyadi Janos water from the Hunyadi Arpad, Hunyadi Laszlo, Hunyadi Bela and other Hungarian bitter waters thereafter coming into the market, which all used the word "Hunyadi" and the red-and-blue label.

This mark was meant to appeal to the sight, so that the public would know that the red-and-blue label was no longer the distinguishing mark by which the Hunyadi Janos water was to be recognized. In other words, the public was no longer to rely upon the word "Hunyadi" and the red-and-blue label as the distinguishing marks of the Hunyadi Janos water; but was to rely on the red diamond mark to distinguish such Hunyadi Janos water from the other Hungarian bitter waters, all of which used red-and-blue labels.

The announcements of April 6th, 1889, and of April, 1893, emphasize this intention, and show that the red diamond mark was not intended to distinguish the mere name "Hunyadi Janos" from the other Hunyadis in the Market, but was intended to be the mark by which the Hunyadi Janos red-and-blue label was to be distinguished from the other red-and-blue Hungarian bitter water labels.

THE FINDING OF THE COURT THAT THE USE OF THE EISNER & MENDELSON "SEAL BRAND" LABEL WAS NOT AN INFRINGEMENT AMPLY JUSTIFIED AND SUSTAINED BY THE EVIDENCE.

The Circuit Court says, with reference to this Seal Brand Label, as follows, at page 625 of the Record:

"In 1893 the Eisner & Mendelson Company began "to use, and has used ever since, upon their stand- "ard bottles of Matyas water an additional label "consisting of a red seal upon a white ground and "containing the words, 'Ask for the Seal Brand. "'This label has been adopted to protect the pub- "'lic from imitation, and as a guarantee of the "'genuineness of the Hunyadi Matyas Water "'imported solely by the Eisner & Mendelson Co., "'New York.' The attention of druggists has "been called to this seal brand by advertisements "in the trade papers."

The Court further says, at page 627 of the Record, as follows:

"The defendant has, however, since 1893, for the "purpose of having a mark of its own and thus avoid "the injurious effect of new competitiou, used a dis- "tinctive 'Seal Brand,' which is a red seal upon a "white ground, large enough and peculiar enough to "be easily recognized, and which informs the public, "in substance, that the water is Matyas Water and "is sold only by the defendant."

The Court finds that, as the defendant had the clear right to use the words "Hunyadi Matyas" to designate its water, this peculiar and distinctive seal-brand label identified the Hunyadi Matyas water with the Eisner & Mendelson Company, and distinguished it by its red-seal mark from all other Hunyadis in the market.

The evidence on which the Circuit Court bases these portions of its opinion is entirely undisputed, but we desire to call the attention of this Court in this connection to what happened in the year 1893 in regard to Hunyadi waters, which naturally led to the adoption and use of the seal-brand label by the defendant corporation.

On May 2d, 1892, the Eisner & Mendelson Company entered into the Ungar lease, under which it imported and sold the Hunyadi Arpad, Hunyadi Bela, Victoria and Rakoczy Gyorgy waters. By the terms of this contract, the Eisner & Mendelson Company was bound to sell yearly as many bottles of the Ungar waters as of Hunyadi Matyas water, and the whole spirit of the contract shows that it was the intention of the parties that during the term of the contract no change should be made in the conditions existing at its commencement, without the mutual consent of the parties. Therefore, during the year 1892, it was obviously impossible for the Eisner & Mendelson Company to make a substantial change in its label without violating the spirit of the agreement, and, besides this, there would have been no motive, as, no matter how

popular or how distinguished from other waters the Hunyadi Matyas water might have become by the adoption of a new label, its sales could not, in accordance with the Ungar contract, be made to exceed the sales of the Ungar waters.

But on July 6th, 1893, this condition of affairs was entirely changed by the buying up by the complainant of the Ungar springs and the consequent cancellation of the Ungar contract with the Eisner & Mendelson Company. The said Company was thereafter entirely free from the entanglements of the contract, and privileged to make any changes it pleased in the Hunyadi Matyas label.

In the spring of 1893, also the Apollinaris Company published and circulated broadcast, by means of postal cards addressed to the trade and physicians and all persons interested, and by advertisements in trade and even daily papers, the formal announcement that "Hunyadi" had become a generic name, and that the Hunyadi Janos label was to be distinguished from other Hunyadi waters by the red diamond mark.

After these occurrences in the year 1893, the Eisner & Mendelson Company took measures to protect the name "Hunyadi Matyas," and distinguish the Hunyadi Matyas water and its label from all other Hunyadi waters.

On August 22d, 1893, the Company obtained a United States trade mark (Record, page 613) for the name "Hunyadi Matyas," and about the same time adopted the seal brand label, which the Company has invariably used ever since on its standard bottle. (Record, p. 354.)

The seal adopted was a large red seal displayed on a white background, with the language quoted above from the opinion of the Court, identifying the Hunyadi Matyas water with the Eisner & Mendelson Company as its exclusive seller. This label was so placed as to partially obliterate one of the side panels of the red and blue label.

The undisputed evidence also shows that the

Eisner & Mendelson Company often after its adoption, advertised the seal brand label in the trade papers (Record, p. 355), and also by the circulation of mailing slips called attention to the seal brand as identifying the Hunyadi Matyas water. (Record, pp. 355–356.)

It is also testified at page 356 of the Record, that by the use of the seal brand label on the Hunyadi Matyas water, and by the publicity given to the name "Seal Brand," such name has to a large extent become an alternative name or designation for the Hunyadi Matyas water, the trade ordering it and calling it "Matyas Seal Brand," or simply "Seal Brand."

That the adoption and use of the seal brand label did perform its office of distinguishing the Hunyadi Matyas water from the other Hunyadi waters in the market, and identifying such water with the Eisner & Mendelson Company as seller, is shown indirectly by the fact that the table of importations of Hunyadi waters (set forth in the opinion of the Circuit Court at p. 625 of the Record), shows that the importation of the Hunyadi Matyas water by the Eisner & Mendelson Company was largely increased, over previous importations, in the years of 1894 and 1895.

In 1894 the importation amounted to over three hundred thousand bottles, and in 1895 to over two hundred and fifty thousand bottles. These importations were a very large increase over any previous importations, which facts show that the sale of the water was increased largely in popularity and extent of sale by the adoption of the seal brand label. The table only shows the importation of this water for a few months in the year 1896, from January to April, and, therefore, does not show the importation in full for that year.

In the year 1893, the Eisner & Mendelson Company exhibited its Hunyadi Matyas water at the Columbian Exposition, where such water obtained the Highest Award for excellence, and often adver-

tised this fact in connection with the seal brand label. (Record, p. 355.)

The Court is, therefore, amply justified in its conclusion that this seal brand label fully distinguished and differentiated the Eisner & Mendelson Hunyadi Matyas water from the other Hunyadi waters in the market.

The complainant had such knowledge that she must be deemed conversant with the acts of the Apollinaris Company and the situation as regards the sale of Hunyadi waters in the United States during the last eight years of the Apollinaris contract.

The petitioners' counsel strenuously assert in their brief that the main reason why the complainant was not bound by the acts of the Apollinaris Company with regard to the name "Hunyadi" and the label, was, that there was no proof of complainant's knowledge of such acts or of the alleged infringements which occurred during the term of the Apollinaris contract.

Under the finding of the Court of Appeals, this alleged want of knowledge is immaterial, as the Court holds that Saxlehner and the complainant were and are chargeable with such knowledge.

The Court well says in this regard: "Nor is the "situation changed by Saxlehner's absence abroad. "If he had chosen to sell his own goods in this "country, thus becoming the dealer here familiar "with the conditions of the business, he must inev- "itably have acquired the knowledge as to appro- "priation of the name and label, which the Apol- "linaris Company acquired, and if, with such "knowledge, he went on year after year without "even giving notice of dissent and non-acquies-

"cence, there would surely come some time when "he must be held to have abandoned his exclusive "claims. And he cannot avoid the imputation of "such knowledge, merely by selling his entire im- "portation to a single person, leaving to that per- "son the distribution of the goods to the trade here. "If he wished to hold on to his trade name and "trade label in this country he should either have "taken steps to advise himself as to the situation, "or should have seen to it that his selected vendee "who shared with him in his monopoly took proper "action to maintain his rights." (Record, page 596.)

As, however, the complainant's counsel has made the point that the complainant is not chargeable with the acts of the Apollinaris Company during the term of the contract, because she did not have any knowledge thereof, we propose to show that she had such knowledge that under the law she must be deemed conversant therewith, and, therefore, bound thereby.

The only person connected directly with the complainant, examined in this case on her part, was Kalman Saxlehner, her son, a young man, who at the time of testifying in 1897, was 29 years of age, and who, since the termination of the Apollinaris contract has been in charge of the New York branch of the Hunyadi Janos business.

He, indeed, testifies that he did not personally know of the situation regarding the sale of Hunyadi Janos waters in the United States, until he came to this country, in the year 1895. He explains this by stating that while his active participation with the firm of Andreas Saxlehner began in 1888, he was not initiated into the more important matters of the firm business until several years thereafter.

His statement with regard to this matter is found at pages 116 and 117 of the Record.

He states in answer to cross-examining questions on these pages, that for the reasons he gives, as above stated, he personally had no definite knowl-

edge of the situation of Hunyadi matters in the United States until 1895, but he says frankly that he speaks only for himself, and will not swear that the firm of Andreas Saxlehner did not have such knowledge of the situation of Hunyadi matters in this country. On the contrary, he states that so far as relates to the sale of Hunyadi Matyas Water, the complainant may have had such knowledge, for when asked in x-Q. 134 (p. 115) whether or not the firm of Andreas Saxlehner knew of the sale of Hunyadi Matyas water in the United States, he says as follows:

"I don't know; MAYBE THEY KNEW."

This was the testimony as to complainant's knowledge of Hunyadi matters in the United States, given in *prima facie* case.

In defense, in regard to complainant's said knowledge, the following facts were shown by undisputed evidence:

1st. It was shown that the firm of Mattoni & Wille, with which firm the Eisner & Mendelson Company made their 1890 lease, were rival and bitter competitors of the complainant in the sale of Hungarian bitter waters, and were the owners of the Hunyadi Matyas springs, which were situated in Buda Pest, at a comparatively short distance from the Hunyadi Janos springs, and had their establishment and conducted their business of bottling and preparing such waters for shipment in the same city.

It is also in evidence, testified to by Mr. Eisner, at page 395 of the Record, that the bottles of Hunyadi Matyas water sold under the 1890 lease were labeled at Buda Pest, and continued to be so labeled during the term of the Apollinaris contract, such labeling at Buda Pest being only discontinued about a year before he testified, or in the fall of 1896.

It is impossible, therefore, to believe, in the face of these facts, that the complainant did not know of the sale of the Hunyadi Matyas water by the

Eisner & Mendelson Company, and of the label used by them during the term of the Apollinaris contract.

2d. But the most important fact which brings directly home to the complainant, her knowledge of the sale of Hunyadi Arpad, Hunyadi Matyas and Hunyadi Laszlo waters in the United States, is her buying up the Hunyadi Arpad and Hunyadi Bela springs in the summer of 1893.

At this time the Eisner & Mendelson Co. were selling the Hunyadi Arpad and Hunyadi Bela waters under their red and blue labels, under an arrangement with Ungar, the owner of said springs, by which said company had been made the sole and exclusive seller of the same in the United States. They were also selling the Hunyadi Laszlo water by a like arrangement with its owner, and were selling the Hunyadi Matyas water under the 1890 lease, and had advertised such waters and themselves as exclusive sellers thereof in trade papers and in other ways.

On July 6th, 1893, the Hunyadi Arpad and Hunyadi Bela springs were bought by the complainant of Ungar, their owner, the springs closed, and the importation of these waters to the United States, to be here sold by the Eisner & Mendelson Company, stopped. (Record, pp. 333, 334.)

It was further shown that the price paid by complainant was two hundred and twenty-five thousand florins (Fl. 225,000), or seventy-five thousand dollars ($75,000), ten thousand dollars of which, or its equal in value, being received by the Eisner & Mendelson Company for its contract. (Record, p. 333.)

This fact was so important and significant, as showing that the complainant must have had knowledge at the time of the Hunyadi situation in the United States, that the complainant's counsel, in their brief at final hearing, were obliged to take notice of the fact and endeavor to diminish its force. This is what they said on this subject in their brief at final hearing:

"The purchase by complainant of Ungar's 'Vic-"toria' and 'Hunyadi Arpad' springs in 1893, un-"doubtedly acquainted the complainant with the "fact that the Eisner & Mendelson Company had an "agency for those waters in the United States, but "is not proof that complainant knew under what "labels defendant was selling these waters here."

The statement in this quotation that the complainant did not know under what labels defendant was selling these waters, is very lame, in view of the admission that she knew that the Eisner & Mendelson Company was the agent, and, therefore, must have known that it was the seller of the Hunyadi Arpad water, and in view of the facts that the Ungar springs were situated in Buda Pest within the city limits and at a short distance from the Hunyadi Janos springs, and that Ungar bottled his waters for export and prepared then for shipment to the United States in the same condition in which they were sold here.

Here, again, it is incredible to believe that the complainant did not know what the Hunyadi Arpad United States label was, and in view of the fact, that she knew that the Eisner & Mendelson Company was the selling agent of such water, that she did not also know that it was also the seller of the Hunyadi Matyas water, the Hunyadi Laszlo and Hunyadi Bela water, of which said Company was agent at the time.

The undisputed evidence as above set forth shows a state of facts which renders it positive that the complainant must be deemed conversant with the situation regarding the sale of Hunyadi waters in the United States, and the acts of the Apollinaris Company with reference to the name "Hunyadi" and the red and blue labels, from in or about the year 1890.

3d. One thing is certain, and that is, that after such a presentation of facts as made by the defendant, the burden of proof was thrown on the complainant to

show in rebuttal that the firm of Andreas Saxlehner did not have such knowledge.

No attempt, however, was made to refute the facts shown by the evidence in defense or to show such want of knowledge.

The only witness connected with the complainant produced in rebuttal was Kalman Saxlehner, who was recalled to testify as to various facts. But in his testimony he makes no attempt to explain the facts proving such knowledge produced by the defendant in its defense.

On the contrary, on cross-examination, he states a fact which tends strongly to prove that the complainant must have been, prior to the year 1891, thoroughly familiar with Hunyadi matters in the United States.

Saxlehner is asked at page 215 of the Record, where the red-and-blue label used by the Apollinaris Company during its contract was put on, and states that the red-and-blue labels were put on at Buda Pest.

He is then asked by whom the red diamond label was put on, and states that it was put on by the Apollinaris Company against the wish of the firm of Andreas Saxlehner, and that in 1891 the firm tried to make a motion in England against it.

This motion was either not attempted, or, if attempted, unsuccessful, because it is not referred to by Saxlehner again.

But the significance of this piece of evidence is that it shows that the complainant in the year 1891 and prior thereto, was thoroughly familiar with the fact that the Apollinaris Company used the red diamond mark on the red-and-blue Hunyadi Janos label.

It is, therefore, impossible to believe that the complainant, knowing all about the use of the red diamond mark, was not also familiar with the circumstances in the United States which made its use by the Apollinaris Company necessary, in order

to distinguish the Hunyadi Janos water from the other Hunyadi waters using the red-and-blue label.

From the above circumstances, we contend that if knowledge on the part of the complainant of the sale of Hunyadi Matyas water during the term of the Apollinaris contract, and the acts of the Apollinaris Company with reference to that and the other Hunyadi waters is material to the issues of this case, such a state of facts has been shown by the evidence, as must have necessarily and inevitably led the complainant to a knowledge of all the material actions on the part of the Apollinaris Company, on which the defendant relies in its defense, and that, therefore, for this reason, the abandonment, neglect and laches of such company with regard to the Hunyadi Matyas and other waters, must bind the complainant.

The above facts are ample to bring this case within the doctrine announced by this Court in the case of *Johnson* vs. *Standard Mining Co.*, 149 U. S., pp. 360–370, to the effect that where a question of laches is involved, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put the duty of inquiry upon a man of ordinary intelligence.

In this case, the Court refers to the previous case of *Foster* vs. *Mansfield*, 146 U. S., 88, where the same principle was applied. The same principle was also substantially applied in the subsequent case of *Hardt* vs. *Heidmeyer*, 152 U. S., 547, 558.

The 1888 Saxlehner Letters.

On page 22 of Petitioner's brief appears a portion of a copy letter written by the Apollinaris Company to Andreas Saxlehner. This letter is dated June 26, 1888, and is in full as follows:

"We think it only courteous, in spite of your "refusal to assist in the proceedings in our action "against the Agent of Ignatz Ungar in New York "(this had reference to the Hunyadi Arpad water), "to inform you that on Saturday last we for the "first time heard by telegram from New York "that a motion would be made on the 2d day of "July next by the said Agent to dissolve the in- "junction granted in 1886, restraining him from "using Ungar's Hunyadi Arpad label. The recently "published decision of the Hungarian Minister of "Commerce given against you in your case *v.* Hun- "yadi Joseph confirms us in the opinion which we "had formed more than a year ago, and mentioned "to you in our letter of the 8th of March, 1887, "that we cannot hope to succeed in preventing the "sale of other waters in America under names of "which Hunyadi forms apart. We do not, there- "fore, intend to oppose the dissolution of the "injunction."

Another copy letter from said Company to Saxlehner, dated January 24, 1888, is also set forth at page 604 of the record, in which Saxlehner is asked to aid and assist the Apollinaris Company in prosecuting infringers. The letter was so framed, that if Saxlehner did not answer it, the Apollinaris Company were to understand that Saxlehner refused to so aid. No answer was returned to this first letter, and then, in June, the Apollinaris Company wrote the second letter set forth above.

The copies of these letters were ruled out by the Circuit Court as hearsay testimony. The Court of Appeals did not pass specifically on the point. The

Defendant-Appellant in its appeal, made the exclusion of these copy letters as proper secondary evidence, the subject matter of its eighth assignment of error (Record, p. 641), and therefore is at liberty to bring the matter before this Court. The matter came up in this way.

Isidor Haldenstein was the direct representative of the Apollinaris Company in this country, first between the years 1883 and 1889, with Frederick de Bary & Company, the Agents of the Apollinaris Company in the United States, and thereafter with Charles Graef & Company, commencing in 1889, until the terminatien of the contract with the Apollinaris Company in 1896.

He was produced as a witness by the defendant, and it appears from his testimony, that after the termination of the Apollinaris contract in 1896, Emilie Saxlehner, in the spring of 1897, brought suit against Charles DeGraef & Co., the agents of the Apollinaris contract, for using the Red Diamond mark on bottles of a water called "Apenta," and applied for a preliminary injunction. The suit was brought upon the theory that the use of the Red Diamond mark on the bottles of "Hunyadi Janos" water during the Apollinaris contract, and for the period of some nine years, so identified and associated the mark with the "Hunyadi Janos" label that its use on the Hungarian bitter water "Apenta" label was unfair, especially by reason of the fiduciary relations of the Company as agent for Saxlehner during the period of the contract (Record, p. 526).

It further appears that the copies of the letters above referred to were introduced in evidence on part of said defendants on the injunction motion in the affidavit of Julius Charles Prince (Record, p. 531). The motion was heard by Judge Lacombe, and denied by him, and the authenticity of these copies and their correctness was not denied by the complainant, Emilie Saxlehner, who is also the complainant in this present suit, or on her behalf. In-

quiry was made for the original letters of Kalman Saxlehner on *prima facie* case, and he was asked what had become of them, and to make search for them, and was informed on the record that the sole purpose of this portion of the cross-examination was to notify the firm of Saxlehner to produce such letters, so that, if not produced, secondary evidence of their contents might be introduced (Record, pp. 119, 120). Before producing Mr. Haldenstein as a witness, defendant's counsel gave formal notice to complainant's counsel to produce the said original letters, and informed him that unless produced, secondary evidence would be introduced of their contents (Record, p. 524).

The original letters not being produced on the examination of Mr. Haldenstein, his attention was called to these copy letters, and he said he knew of them from correspondence of the Apollinaris Company and from the Prince affidavit used in the injunction motion. (Record, pp. 530, 531.) After further examining him with reference to the matter, a certified copy of the Prince affidavit containing these copy letters (the original affidavit being on file in the Court) was produced, and offered in evidence for the sole and only purpose of producing these copy letters as secondary evidence (Record, p. 531). We, therefore, claim that the complainant, having been notified to produce the originals of these letters, and having had the fullest and fairest opportunity to produce, and failing to do so, the copies of these letters in the Prince affidavit were proper secondary evidence. It is also to be observed that these copy letters had been already used in judicial proceedings brought by the same complainant, and the correctness of the copies had not been questioned, or if objected to, the objection was overruled by the Court, as the Court denied the injunction motion, and in so doing, says, on the authority of these letters, that Saxlehner refused to aid or assist the Apollinaris Company in 1888 in the matter.

We, therefore, ask the Court to consider these

copy letters, as their importance is obvious, because they at once do away with all pretence on the part of petitioner's counsel, that Saxlehner did not know and was not informed of the proposed abandonment of the 1888 Ungar litigation.

Testimony of the Trade that the word "Hunyadi" has been a Generic Word, and the Red and Blue Labels used in Connection with such word, Common to the Trade During the Last Eight or Ten Years.

That the word "Hunyadi" in the United States since about the year 1888, when the Andres and Ungar suits were discontinued, and the exclusive right to the said word, and to the red and blue label, abandoned by the Apollinaris Company, as the representative of Saxlehner, had become generic, and the red and blue label common property, appears by the following testimony:

Paul Scherer testified with regard to the history of Hunyadi Arpad and other Hunyadi waters, from page 425 to page 436 of the Record.

He says that as soon as the injunction was vacated in the Ungar suit he became the agent for the sale of Hunyadi Arpad water for the City of New York, under Perrine & Co., the General Agents of Ungar in the United States.

He testifies that this Hunyadi Arpad water was sold in bottles with capsules and labels as shown substantially on Defendant's Exhibit Hunyadi Arpad Bottle, and that he continued to so sell the said water as Agent for Ungar in 1892, when he was succeeded by the Eisner & Mendelson Company, as hereinafter referred to.

Scherer also sold during the same period, as Agent for Ungar, the Hunyadi Bela water, and two

other Hungarian bitter waters called "Victoria" and "Rackoszy Gyorgy," of which springs in Hungary, Ungar was the owner.

During the same period from 1888 to 1892, and thereafter, he also sold as a general mineral water dealer, another mineral water called "Hunyadi Laszlo."

The labels under which these waters were sold are shown at pages 30, 50 and 52 of Defendant's Scrap Book.

After giving this testimony he states (Record, 441) that the various Hunyadi waters he sold or knew of were called either "Hunyadi" or "Hungarian" bitter waters, the said names being alternate names for the various Hunyadi waters he has referred to and spoken of in his testimony, and that from his wide experience from the year 1888 up to the time he is testifying, as a mineral water dealer, both at wholesale and retail, he can state that the word "Hunyadi" has during that period been a term used to designate "Hungarian" bitter waters.

Scherer's testimony is valuable, owing to the fact that he has been constantly in the mineral water business in the United States since 1873, and his experience in regard thereto, especially as agent for the Hunyadi Arpad and Hunyadi Bela from 1888 to 1892, and his acquaintance since with the various Hunyadi waters in the market, which he has been known as a dealer both at wholesale and retail.

Mr. Isidor Haldenstein has been referred to in this brief as the man who since 1883 had charge of the Hunyadi Janos business in the United States as the direct representative of the Apollinaris Company in this country, up to the time of the termination of the Apollinaris contract in 1896. Mr. Haldenstein, as the testimony shows, was, when he testified, the agent for the Apenta water, a rival and competitor of the Hunyadi Matyas and Hunyadi Janos water in this market. He is, therefore, of course, a hostile witness, and his testimony is valuable as coming from an unfriendly

source. He states, at page 537, that in the period between 1888 and 1897 he has known of ten or eleven Hunyadi waters being sold in the United States, the names of which he gives as follows: Hunyadi Janos, Hunyadi Arpad, Hunyadi Matyas, Hunyadi Laszlo, Hunyadi Lajos, Hunyadi Alajos, Hunyadi Vilmos, Hunyadi Bela, Hunyadi Miklos and Hunyadi Joseph. He then, from page 802 to 804, identifies the labels under which the various waters were sold during this period. It further appears that Mr. Haldenstein, in his affidavit on the motion for preliminary injunction in the suit of *Saxlehner against Graef*, brought in the spring of 1897, testified as to the importation of the various Hunyadi waters during the period from 1886 to 1897.

He is asked about this importation and testified in relation thereto from pages 537 to 541 of Record. He gives the importation of each individual Hunyadi water during this period, and states that he carefully compiled the data from the best sources of information at hand, such sources being the "Journal of Commerce" and "Bonfort's Journal," which are the recognized authorities on importations.

A tabulated statement of these importations is given in the opinion of the Circuit Court, at page 625 of the Record.

After giving these data, Mr. Haldenstein is asked what he and the mineral water trade from 1888 or 1889 understood the word "Hunyadi" to mean as applied to mineral waters, and states, substantially, that the trade understood it to mean an aperient water coming from the neighborhood of Buda Pest. He further says that during this period the different Hunyadi waters were distinguished by the dealers selling them by the word "Hunyadi" with the suffix or second name "Arpad," "Matyas," Janos," "Bela," etc. (Record, p 541.)

The testimony of Mr. Scherer, Mr. Haldenstein, and Mr. Eisner, which we have heretofore given,

with reference to the history of Hunyadi waters in the United States, and the meaning of the word "Hunyadi" and the facts relating thereto, are, from the acquaintance of these gentlemen with the facts of the trade and their experience as detailed in their evidence, the best source of information obtainable.

But the defendant, in presenting its case, was not satisfied with this evidence alone, but proceeded to verify and corroborate it by the testimony of the general trade, both retail and wholesale, of a high character.

THAD. D. WILSON, whose direct evidence is given from pages 466 to 468 of record, states that he has been employed for the last fourteen years by the firm of Lehn & Fink, of New York City, which firm are wholesale dealers in drugs and large dealers in mineral waters; that said firm is well known throughout the country, and does a large business, employing twenty-two salesmen; that he has known the Hunyadi Matyas, Hunyadi Arpad, Hunyadi Janos, Hunyadi Bela, Hunyadi Laszlo and Hunyadi Lajos waters for the last eight years, and has bought them all with the exception of the Hunyadi Bela water; that said waters have been known generally by the trade during the last eight years as "Hunyadi" waters, and specifically as "Hunyadi Janos," "Hunyadi Matyas," "Hunyadi Arpad," etc., and that the said firm of Lehn & Fink sold such waters by such distinctive names.

ALFRED H. KENNEDY, whose testimony is given from pages 477 to 482 of record, states that he has been connected with the Charles N. Crittenton Company and its predecessor for over thirty years; that the said Crittenton Company is the largest dealer in proprietary medicines in the country, and a large dealer in mineral waters, and that he has known during the last eight years, some seven or eight Hunyadi waters in the market, and has dealt in the

same, and that such Hunyadi waters all had the threefold division label with red centre and two blue wings. He further states that when an order was given by a customer, the said Crittenton Company asked the person so ordering to specify what "Hunyadi" he wanted, and that they gave him the kind of Hunyadi water specified, and that during this period all these mineral waters have been classed as "Hunyadi" waters, and distinguished from each other by their specific names, "Matyas," "Arpad," "Janos," etc., and that the trade generally understood by the term "Hunyadi" a class of waters coming from Buda Pest, the full names designating the particular springs.

CHARLES O. WEISZ testifies, from pages 488 to 492, that he has been connected with the well known firm of McKesson & Robbins for the last twenty-seven years, and that such firm during the last ten years has dealt in "Hunyadi" mineral waters, the Hunyadi Arpad, Hunyadi Matyas, Hunyadi Laszlo, Hunyadi Lajos and Hunyadi Bela, and that these waters are distinguished from each other by said specific names, and that McKesson & Robbins have had such waters on their price lists and catalogues during that period.

The testimony of Mr. Wilson, Mr. Kennedy and Mr. Weisz is very valuable as showing what the wholesale mineral water dealers have understood by the term "Hunyadi," and that such Hunyadi waters have been sold freely by all these firms, distinguished from each other by their specific names, and that they have been listed in their catalogues and price lists under the generic name "Hunyadi."

The defendant also produced a number of retail druggists, who speak for the retail drug trade in regard to the sale of Hunyadi waters in the market during the last eight years.

WILLIAM J. QUENCER, who testifies from pages 458 to 466, states that he has been engaged for the last

eight years at the pharmacy at 400 West Fifty-seventh street, corner Ninth avenue, in the City of New York, and during that time has sold Hunyadi Arpad, Hunyadi Lajos, Hunyadi Janos and Hunyadi Matyas waters. He identifies the bottles, labels and capsules in which these waters have been sold by him, respectively. He states that it has been his habit during the last eight years, when a customer calls at the store and asks for Hunyadi water, to ask him which Hunyadi he wishes, and then to give him his choice out of the Hunyadi waters he is handling at the time, and that his custom has been the same when inquiry has been made for Hungarian bitter waters; that he has understood during this period that the word "Hunyadi" means a general class of waters, to which the "Hunyadi Janos," "Hunyadi Matyas," "Hunyadi Arpad" and "Hunyadi Lajos" waters belong, and that the different springs are distinguished from each other by their second names.

His cross-examination only confirms what he has testified to on direct examination, that the word "Hunyadi" during the last eight years has been, in the retail drug trade, a generic term for Hungarian bitter waters generally, which have been distinguished from each other by the suffix or second name "Janos," "Matyas" and "Lajos."

At page 466, he states that at no time since 1889 has he connected the name "Hunyadi" with "Hunyadi Janos" water more than with any other bitter water.

SHERMAN F. HENNESSEY testifies that he has been for the last year and a half connected with the pharmacy at the corner of Broadway and Barclay streets, and that he was previously with the Hudnuts for three years, and previous to that time with various other druggists, the whole embracing a period of seven years.

He states that during these seven years he has known Hunyadi Janos, Hunyadi Arpad, Hunyadi

Lajos and Hunyadi Matyas waters, and if a customer asked for "Hunyadi" water he would ask him which kind of "Hunyadi" water he wished, and if he specified, he would get the specific kind of Hunyadi water he asked for; that, if the customer was not particular or did not care to specify, that he (Hennessey) would exercise his own judgment and give him any Hungarian bitter water that he had in stock; that during this period he has also known that these various Hunyadi waters were all classed under the general term "Hunyadi" and distinguished from each other by their second names. (Record, pp. 419-471.)

GEORGE H. BANCROFT'S testimony as a retail druggist is especially valuable, because for the last twelve years he has been connected with Hudnut's well-known Pharmacy. He testifies from pages 472 to 477 of Record that he has known during that period Hunyadi Janos, Hunyadi Arpad, Hunyadi Matyas, Hunyadi Lajos and Hunyadi Laszlo waters, all designating a general class of waters, distinguished from each other by their second names. On cross examination, he says that his customers call for "Hunyadi" in different ways, sometimes for "Hunyadi" water, and sometimes specifying the particular name, and that there is a reason for this distinction by customers of the various Hunyadi waters by their specific names, and this is because of the different prices; that some people are educated, he thinks, to buy a lower-priced water (p 474).

ADOLPH E. GEBHARD testifies from pages 492 to 495 of Record. He states that he is now engaged in business as a druggist at 361 Eighth Avenue, and has been in the drug business about thirteen years in the City of New York, and has sold and dealt in for the last eight years the various Hunyadi waters on the market, and he has always understood by the word "Hunyadi," as applied to these waters,

that they are waters supposed to be imported from Hungary, Buda Pest, and that the words "Matyas," "Janos," "Arpad," "Laszlo," etc., indicated the particular springs.

DOMINICK A. GREAVEN testifies from pages 511 to 513. He states that he has been connected with the well-known Perry's Pharmacy, now in the "World" building, and prior to that in the "Sun" building, and during the last eight years has dealt in Hunyadi Janos, Hunyadi Arpad, Hunyadi Matyas and Hunyadi Laszlo water; that it has been the custom in that store during that period if a customer ask for a specific Hunyadi water to give it to him, and if he declines to specify to give him any Hunyadi water the pharmacy had in stock.

GUSTAVE STRASSBURGER testifies, on the part of the defendant, from pages 513 to 522. He states that he was first employed by the P. Scherer Company; that about the year 1890 he entered the employ of the Eisner & Mendelson Company as salesman, and, commencing in the year 1892, he sold to about all the large trade east of Chicago all the various mineral waters that the Eisner & Mendelson Company dealth in, and the Hunyadi waters; that during the course of this employment he should estimate that he had visited at least thirty thousand grocers and druggists, including all the wholesale and retail grocery and drug stores in that section of the country he so traveled over, and has sold such trade the Hunyadi Arpad, Hunyadi Matyas, Hunyadi Janos, Hunyadi Bela and Hunyadi Laszlo waters; that he has also known of the Hunyadi Lajos and Hunyadi Vilmos waters, and that the various Hunyadi waters that he sold were distinguished from each other by their specific names, and that he sold them by their specific names, and that they were so distinguished in the trade he sold to.

The above testimony of both the wholesale and retail mineral water trade makes it clear that the

trade has understood for the last eight years that no one person was entitled to the exclusive use of the word "Hunyadi," and that neither the buyers or sellers have known any water by the single word "Hunyadi," and that in writing and speaking the trade has distinguished one Hunyadi from another by emphasizing the word "Janos," "Matyas," "Arpad," "Laszlo" or "Bela," with which the generic word "Hunyadi" is associated.

The complainant produces neither in *prima facie* case nor in rebuttal any testimony of importance tending to refute or impair the strength of the above trade testimony introduced by the defense.

In the *prima facie* case, John R. Agnew, as the representative of Park & Tilford, and William B. Higbee, as the representative of Acker, Merrill & Condit, testify that these firms have sold for many years Hunyadi Janos water, and that they have known such water as Hunyadi water. It is apparent that this testimony does not show that during the last eight years other Hunyadi bitter waters have not been on the market. Indeed, as regards the firm of Acker, Merrill & Condit, Mr. Eisner, in defense, produced three orders from that firm for Hunyadi Matyas water (Record, page 358). These orders are dated in 1896 and 1897, and are shown at page 70 of Defendant's Scrap Book.

In rebuttal, the complainant produced the evidence of Henry A. Cassebeer, Oscar Krause and Abram P. Kerley, retail druggists in the City of New York, who say that they have sold Hunyadi Janos water, and such water had been commonly demanded as Hunyadi water, Hunyadi Janos water or Hungarian bitter water, but the testimony of these witnesses is deprived of all force by their admissions that they have either sold or known of other Hunyadis in the market during this time.

Thus Cassebeer testifies as to the sale of Hunyadi Arpad water (Page 175 of Record); on cross-examination at page 176, he states that he has had Hunyadi Matyas water in stock for some years back, and may have had calls for it.

Krause testifies on cross-examination (Record, pages 178 and 179) that he has known of the Hunyadi Arpad and Hunyadi Matyas waters on the market for the last ten years, but that he has only sold and dealt in Hunyadi Janos water. He further admits that he has seen advertisements or statements in the papers of the Apollinaris Company stating that they put the diamond brand label on, of which Diamond Brand he speaks throughout his direct testimony, to distinguish Hunyadi Janos water from the other Hunyadis in the market.

Kerley testifies on direct examination, page 183, that while the Hunyadi Arpad has gone out, he orders the Hunyadi Matyas by the quarter or half dozen.

On cross examination, page 184, he testifies that he orders Hunyadi Matyas because people demand it under the name of Hunyadi Matyas, and he sells it by that name, and that during the last ten years he has known several Hunyadi waters, of which he has handled the Hunyadi Arpad, Hunyadi Matyas, the Hunyadi Janos and the Hunyadi Apenta, and that the Hunyadi Arpad, Hunyadi Matyas and Hunyadi Janos are distinguished from each other by their second names.

It is thus apparent that the complainant has produced no trade testimony to refute the overwhelming testimony of the trade produced by the defendant in defense.

The complainant endeavors to make up for this this lack of trade testimony, by producing the evidence of a number of physicians, who testify substantially that they have known Hunyadi Janos for years and have prescribed it for patients as Hunyadi water. A careful reading of their testimony makes it clear that they have generally prescribed it only in an informal way, by telling the patient to get a bottle of Hunyadi water. The fact that they supposed that the patient on going to a drug store and asking for Hunyadi water would, during the last ten years, be sure to get Hunyadi Janos water,

simply shows their ignorance of what has been going on in the mineral water and drug trade, and of the true situation. A large number of these physicians, especially those who testified in *prima facie* case, are young practitioners, some of whom are yet at Bellevue Hospital, and a number of the others on cross-examination either show their ignorance, by stating positively that they never heard or knew of any other Hungarian bitter water, or that they may have seen advertisements of Hunyadi Matyas water or may not, but that they paid no attention to advertisements, and so have not borne the matter in mind.

It is clear that the mere supposition of these physicians that their patients on going to a drug store in the city of New York and asking for Hunyadi water would always be sure to get Hunyadi Janos water, because they supposed that was the only Hunyadi water in the market, is not material to refute the true fact of the situation for the last ten years, which has been shown by defendant's testimony to be that some ten or eleven Hunyadis have been known in the market during this period, all of which have been sold freely and all of which have been known by the generic name "Hunyadi," and distinguished from each other by their suffixes or second names.

We have also a piece of evidence in this case, showing that in the month of September, 1896, the Saxlehner firm was fully aware that if physicians prescribed "Hunyadi" they would not get from the drug stores, "Hunyadi Janos."

So well did they know this, that in the Medical Record of September 5th, 1896, they advertised as follows:

"*Observe that the words Hunyadi Janos are in-*
"*separable, and must go together (Bonfort, 10*
"*July, 1896); when prescribing, kindly write the*
"*full name, Hunyadi Janos.*" (Record, p. 609.)

The Austro-Hungary Treaty Matter.

The petitioner's counsel claim substantially that the treaty provides that the reproduction of a trade-mark forbidden in Austro-Hungary is forbidden in the United States; that the use of the word "Hunyadi" as a trade-mark by others than the complainant was not forbidden until 1896, and that until that time, the fact that it was not so forbidden in Austro-Hungary constituted a serious obstacle to suits against its use in this country, but that the moment that its use was forbidden in Hungary in 1896, the provision of the treaty applied, and its use became unlawful here, and that in a suit brought on such trade-mark in the United States thereafter, the defendant could not set up the defense of loss and surrender of rights by acquiescence during the intervening nine years.

This contention is completely disposed of by the Court of Appeals in its denial of the motion for a re-argument.

In addition to the reasons there given, there are other considerations which deprive the petitioner's contention of all force. There never was a moment when the existence of the treaty interposed the slightest obstacle to a suit in this country to enforce the trade-mark derived from *use* in the United States. The precise bill filed in this suit might have been filed against any person using the name or label ever since their introduction into this country through the Apollinaris Company in 1876. The registration of the word "Hunyadi" as a United States trade-mark in the year 1887 is stated in the bill of complaint, but the suit is not brought upon the registered trade-mark, nor to enforce a statutory remedy. It is brought to enforce an alleged common law right, pure and simple, and to prevent unfair competition. The treaty, therefore, has no application.

Moreover, it is not possible to construe such treaty to mean that our Courts could abridge the

rights of American citizens to set up the defense of loss of rights by acquiescence on part of complainant because of any decisions given or laws passed in a foreign country. The treaty only gives to a citizen to Austro-Hungary the right to sue to restrain the infringement of a trade mark here, "just as if the plaintiff were a citizen of this country." It does not give the Austro-Hungarian a right which a citizen of this country does *not* possess, or relieve him from the effect of acquiescence, which, under our laws, would be fatal to his claim.

But there is another fatal objection to the enforcement of any alleged rights under the treaty. The treaty provides that if "*the trade-mark has be-*" *come public property in the country of its origin,* "*it shall be equally free to all in the countries or* "*territories of the other of the two contracting* "*parties.*"

For some fourteen years prior to the year 1887, the evidence shows that the word "Hunyadi" had been used in Hungary, under the sanction of its laws, as a general name to designate springs of Hungarian bitter water belonging to other persons than the owner of the Hunyadi Janos Springs.

We contend, therefore, that if the treaty is to be considered at all, the above facts are fatal to its application in this suit.

The Austro-Hungarian Decrees.

It is evident that this suit against the Eisner & Mendelson Company would never have been brought except for two coincidences:

First—That the Apollinaris Company terminated its contract with the complainant in the spring of 1896 instead of waiting until 1901, when the contract formally terminated, and,

Second—The fact that on October 7th, 1896, the complainant obtained these Hungarian decrees.

These decrees were a complete reversal of the policy which the Hungarian Government had pursued for the previous twenty years, during which time it had allowed the names, so decreed to be unlawful, to be used as designations of the respective springs, and by permitting their registration under the existing Hungarian trade-mark statutes, had legalized and sanctioned their use.

All these so-called decrees are, therefore, in the nature of *ex post facto* laws and are to be regarded in the light of mere edicts of a particular Minister, based upon the intricate regulations and rules of Hungarian trade-mark law, which cannot be made to apply in any way to the common law of this country.

In addition to this, it is to be observed, that on petitioner's own statement, as early as 1894, the Minister of Commerce had forbidden the use by his decree, of the pictorial trade-mark Hunyadi Matyas in connection with its label, whether printed in red and blue or red and white colors. The petitioner could, therefore, have at once brought suit in the United States, for unfair competition, against the use of the Hunyadi Matyas label bearing the words Hunyadi Matyas on its front, and brought in evidence the fact that such label and the use of the word Hunyadi Matyas in connection therewith was forbidden in Hungary, but not only did the petitioner fail to bring suit, but also failed to act in any way in 1894, and waited until after the new law of 1895, in relation to word trade-marks had been passed, under which the entire group of Hunyadi springs was allowed registration, and further delayed any action in the United States until after the edict of the Minister had struck the word trade-marks Hunyadi Matyas, etc., from the registry.

The petitioner can give no valid excuse for this continued delay to take action in the United States during this period running three years, from some time in the year 1894 until the spring of 1897.

It is, however, wholly immaterial that by an ex

post facto law, or ministerial decree, Saxlehner was allowed a trade-mark in *Hungary* which had been for twenty years public property in that country.

Our courts cannot enforce the laws of a foreign country—least of all can they even recognize them where they are repugnant to the very fundamental principles of our jurisprudence. To assume for a moment, that our courts would revive an extinct trade-mark in this country because such extinct trade-mark had been revived in Hungary, is too manifestly unreasonable to require serious discussion.

For the above reasons, the introduction of the Hungarian decrees in evidence and testimony relating to them was duly objected to by the defendant's counsel as immaterial and irrelevant to the issues in this case, and such decrees were not considered by the Courts below as important factors in reaching their conclusions.

Renewal of the Hunyadi Matyas Lease.

It is to be noted that the Hunyadi Matyas 1890 lease under which the Eisner & Mendelson Company had imported and sold the water, was to run for five years from the Spring of 1890, with the privilege of an extension of twenty years longer, if the Eisner & Mendelson Company gave notice of its desire to so prolong the lease, on or before the 1st day of March, 1895.

On August 31st, 1894, the Eisner & Mendelson Company gave such notice (Record, page 555), and in consequence the lease was renewed for twenty years from March 1st, 1895.

During the five years of the original term of this lease, the Eisner & Mendelson Company had entered into the business of importing and selling Hunyadi Matyas water in the United States, after giving due notice, through Mr. Mendelson, to the

Apollinaris Company, the direct representative and agent of Saxlehner in the United States, and with which Company alone the public could deal.

The Eisner & Mendelson Company had thereafter freely imported and sold Hunyadi Matyas water in large quantities during the five years of the original term of the lease.

During this period, as shown by the evidence, some six or seven other Hunyadi waters had been also imported and sold in competition with the Hunyadi Janos water, and all used the three-panel labels with the red centre and the blue wings.

By this usage and custom of the trade, during these five years, the word "Hunyadi" had become a generic term, and the Apollinaris Company had acquiesced in the use of the red and blue three-panel label.

During the same period the Apollinaris Company had also affirmatively acknowledged that the word "Hunyadi" was generic, by its advertisements and publications, and by the continuous use of the diamond mark, and by the wide publicity thus given to the use of the diamond mark had substantially affirmatively acknowledged the abandonment of all claim of exclusive right to the red and blue label.

The Apollinaris Company had also especially acquiesced in the sale by the Eisner & Mendelson Company of the Hunyadi Matyas water under its label, by making no objection to the conduct of the business, or to the name "Hunyadi Matyas" or to the Hunyadi Matyas label, except in the case of the analysis mailing-slip matter, which, as we have seen, was promptly rectified by the defendant Company. The defendant, during these five years, had built up a large and extensive business in importing and selling Hunyadi Matyas water during this period, to the amount of hundreds of thousands of bottles a year.

The defendant company, therefore, relying, and with good reason to rely, on the above-stated acts

of omission or commission by the Apollinaris Company, renewed the lease for the further term of twenty years, commencing to run from March 1st, 1895, and under this extended lease has continued to import and sell the Hunyadi Matyas water, and is now so importing and selling the same. As to the large and extensive business thus carried on by the Eisner & Mendelson Company in the importation and sale of Hunyadi Matyas water and the expenses connected therewith, Mr. Eisner stated that said Company has approximately spent about twenty-five thousand dollars in advertising the said water since 1890. (Record, p. 357).

He gives at page 401 of the Record the number of bottles of Hunyadi Matyas water imported during the years of the lease up to January 1st, 1898, giving the importation by years. The amount aggregates about 1,700,000 bottles.

After all these years of equiescence, with the affirmative acts on the part of the Apollinaris Company, which we have referred to, showing abandonment and surrender of all claim to exclusive rights, the court is now asked to wreck and ruin this substantial business, the inevitable consequence of compelling the Eisner & Mendelson Company to discontinue the use of the word "Hunyadi Matyas," and the labels, bottles and capsules, identified and associated with said words, by and under which the water has been for so many years known and distinguished.

It is to be observed that at or about the time of the renewal of this lease, the Eisner & Mendelson Co. ceased to import the Hunyadi Laszlo water, the label of which is shown in the Brief of Petitioner as Exhibit D. The said Company commenced to use in the summer of 1893 the "Seal Brand" label, shown in said Brief as Exhibit C, and has continued to use the said label only up to the present time, excepting that in the spring of 1896 it imported a few hundred cases of Hunyadi Matyas water, No. 3, the sales of which were trivial and

unimportant. With this exception, the sales of Hunyadi Matyas water since the renewal of the lease have been confined to bottles to which the "Seal Brand" label was affixed, which the Circuit Court found the Defendant was justified in using on the ground that the Seal Brand label distinguished it from the complainant's Hunyadi Janos label and the other Hunyadi labels and bottles in the market.

The Law as applied to the facts.

It is claimed in petitioner's brief that the Court of Appeals dismissed the Bills, on the supposed authority of *Menendez* vs. *Holt*, and that its decision is in conflict with that case, and with the previous case of *McLean* vs. *Fleming*, and that the Appeal Court has substantially decided, against the authority of those cases, that mere delay for nine years bars the right to injunctive relief. With reference to this contention, we desire to say that the Circuit Court of Appeals decision shows on its face, that the Court did not decide that mere lapse of time for nine years barred the right to injunctive relief, but that it was not only the delay for nine years, but such delay continued for nine years *under circumstances showing surrender and loss of rights by acquiescence which led the Court to its decision.*

A review of the Supreme Court authorities will also show, that the decision of the Court of Appeals is not opposed to the law laid down in *McLean* vs. *Fleming*, *Menendez* vs. *Holt*, and subsequent decisions of this Court, where all relief has been denied on account of loss of rights by surrender and acquiescence.

It is true that the Supreme Court of the United States in the year 1887, in the suit of *McLean* vs. *Fleming*, 96 U. S. Rep., 245, laid down the general proposition that mere delay in bringing suit on a

trade-mark, while it will defeat the right to recover for past profits, will not ordinarily prevent injunctive relief.

In the year 1888, in the suit of *Menendez* vs. *Holt*, 128 U. S. Reports, 514, the Supreme Court was asked to reconsider the general proposition laid down in *McLean* vs. *Fleming*, but refused to do so. The Court, however, was very careful to state that this was a mere general proposition, and that the facts disclosed by the record in this suit of *Menendez* vs. *Holt* did not justify the Court in treating the case as an exception to the general rule.

The opinion of the Court makes it evident that in a case where proof of non-user of the trade-mark by the owner, or surrender of the use to the public by acquiescence, or otherwise, is shown, it would unhesitatingly refuse injunctive relief.

In addition to this, there is a line of Federal decisions, both in the Supreme and Circuit Courts, holding that, in trade-mark cases, in Patent suits, and in actions of a general character, long delay in bringing suit, where the facts show that the delay has been accompanied by acts or conduct showing such acquiescence, as would make injunctive relief inequitable, such relief should be denied.

In the suit of *Godden against Kimmell*, 99 U. S. Reports (1878), from pages 210 to 212, a summary of Supreme Court authorities is found in regard to the effect of laches and negligence in the assertion of alleged rights.

In the suit of *Speidel* v. *Henrici*, 120 U. S., pp. 377-397, it was held as follows:

"*Independently of any statute of limitations,*
"*Courts of Equity uniformly declined to assist a*
"*person who has slept upon his rights and shows*
"*no excuse for his laches in asserting them.* 'A
"*Court of Equity,*' *said Lord Camden,* '*has*
"*always refused its aid to stale demands, where*
"*the party slept upon his rights and acquiesced*

"for a great length of time. Nothing can call "forth this Court into activity but conscience, "good faith and reasonable diligence; where these "are wanting the Court is passive and does nothing. "Laches and neglect are always discountenanced, "and therefore from the beginning of this juris- "diction there has always been a limitation to "suits in this Court."

The case of *Speidel* v. *Henrici* has been followed in the subsequent case of *Richards* vs. *Mackall*, 124 U. S., 183, 188 (1887).

In the case of *Mackail* vs. *Casilear* (1890), 137 U. S., p. 566, the Court follows the same principle, and says:

"The doctrine of laches is based upon grounds "of public policy, which require, for the peace of "society, the discouragement of stale demands."

In *Hammond* v. *Hopkins*, (1891) 143 U. S. 224, 250, through Mr. Chief Justice Fuller, the Court said:

"No rule of law is better settled than that a Court "of Equity will not aid a party whose application "is destitute of conscience, good faith and reason- "able diligence, but will discourage stale demands "for the peace of society, by refusing to interfere "where there has been gross laches in prosecuting "rights, or where long acquiescence in the asser- "on of adverse rights has occurred."

The Court also says in the same case at p. 274: *"The hour glass must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused."*

In *Galliher* v. *Caldwell*, 145 U. S., 368, 371, (1891) it was said:

"The question of laches turns not simply upon "the number of years which have elapsed between

"the accruing of her rights, whatever they were, "and her assertion of them, but also upon the "nature and evidence of those rights, the changes "of value and other circumstances occurring "during the lapse of years. The cases are many "in which this defense has been involved and con- "sidered. It is true that by reason of their differ- "ences of fact no one case becomes an exact pre- "cedent for another, yet a uniform principle "pervades them all."

In the case of Foster *vs.* Mansfield, 146 U. S., p. 88 (1892), it was held as follows:

If a bill to set aside foreclosure sale of a railroad under a mortgage, on the ground of fraud and collusion, be not filed until ten yerrs after the sale, a presumption of fraud arises, which it is incumbent in the plaintiff to rebut.

The tendency of the Courts is, in such cases, to hold the plaintiff to a rigid compliance with the law, which demands not only that he should be ignorant of the fraud but should have used due diligence to inform himself of the facts.

In the subsequent suit of *Coats* vs. *Merrick Thread Co.*, 149 U. S. Rep., p. 562, the Court held that acquiescence of twelve years was sufficient to debar complainant from relief. The Court says as follows, at page 573 of said report:

"Indeed, the intent to imitate plaintiffs' spool "heads, if any such intent existed, is manifest "rather in the label than in the periphery, but "plaintiffs having submitted to this without pro- "test for twelve years, have waived their right to "relief upon this ground. McLaughlin v. *Peoples "R. Co., 21 Fed. Rep., 574; Ladd* v. *Cameron, 25 "Fed. Rep., 37; Green* v. *French, 4 Bann & Ard., "169, 3 Robinson, Patents, Sec. 11-94.".*

In the case of *Lane & Bodley Co.* vs. *Locke*, 150 U. S., p. 193 (1893), a period of twelve years acqui-

escence was held to bar the right of injunctive relief in suit for infringement of patent.

At page 201 the Court says: "*Courts of equity, "it has often been said, will not assist one who "has slept upon his rights and shows no excuse "for his laches in asserting them.*"

In the case of *Abraham* vs. *Ordway*, 158 U. S., pages 416, 420, the Court says:

"*Whether equity will interfere in cases of this "character must depend upon the special circum- "stances of each case. Sometimes the courts act in "obedience to statutes of limitations, sometimes in "analogy to them. But it is now well settled that, "independently of any limitation prescribed for "the guidance of courts of law, equity may, in the "exercise of its own inherent powers, refuse relief "where it is sought after undue and unexplained "delay, and when injustice would be done in the "particular case by granting the relief asked. It "will, in such cases, decline to extricate the plain- "tiff from the position in which he has inexcusably "placed himself, and leave him to such remedies "as he may have in a court of law.*"

In the case of *Gildersleeve* vs. *New Mexico Mining Company*, 161 U. S., pp. 573–578–579 (1895), various previous decisions on the subject of laches are reviewed, approved and applied.

In *Willard* v. *Woods*, 164 U. S., 502, 524, the Court said:

"*But the recognized doctrine of courts of equity "to withhold relief from those who have delayed "the assertion of their claims for an unreasonable "length of time may be applied in the discretion "of the court, even though the laches are not "pleaded or the bill demurred to.*"

The same doctrine was followed in the case of *Whitney* vs. *Fox*, 166 U. S., pages 637, 647 and 648.

In the recent and leading case of *Penn Mutual Life Insurance Co.* vs. *Austin*, 168 U. S., p. 685, (1898), the Court, after referring and quoting from previous decisions, says as follows, at pp. 697 and 698:

In Lane & Bodley Co. v. *Locke, 150 U. S., 193, and Mackall* v. *Cassilear, 137 U. S., 556, it was held, that the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches. Indeed the principle by which a court of equity declines to exert its powers to relieve one who has been guilty of laches, as expressed in the foregoing decisions, has been applied by this Court in so many cases besides those above referred to as to render the doctrine elementary.*

> " *Whitney* v. *Fox, 166 U. S., 637, 647,*
> " *648;*
> " *Gildersleeve* v. *New Mexico Min. Co.,*
> " *161 U. S., 573;*
> " *Abraham* v. *Ordway, 158 U. S., 416,*
> " *423;*
> " *Ware* v. *Galveston City Co., 146 U. S.,*
> " *102, 116;*
> " *Foster* v. *Mansfield, &c., R. R., 146*
> " *U. S., 88, 102;*
> " *Galliher* v. *Cadwell, supra, where the*
> " *earlier cases are fully reviewed;*
> " *Hoyt* v. *Latham, 143 U. S. 553;*
> " *Hanner* v. *Moulton, 138 U. S. 486, 495;*
> " *Richards* v. *Mackall, 124 U. S. 183,*
> " *189.*

" *The reason upon which the rule is based is not*
" *alone the lapse of time during which the neglect*
" *to enforce the right has existed, but the changes of*
" *condition which may have arisen during the*
" *period in which there has been neglect. In other*
" *words, where a court of equity finds that the posi-*

" tion of the parties has so changed that equitable " relief cannot be afforded without doing injustice, " or that the intervening rights of third persons " may be destroyed or seriously impaired, it will " not exert its equitable powers in order to save one " from the consequences of his own neglect. The " adjudicated cases, as said in Galliher vs. *Cald- " well, supra, 372, 'proceed on the assumption that " the party to whom laches is imputed has knowledge " of his rights and an ample opportunity to estab- " lish them in the proper form; that by reason of " his delay the adverse party has good reason to " believe that the alleged rights are worthless or have " been abandoned; and that because of the change in " condition or relations during this period of de- " lay, it would be an injustice to the latter to permit " him now to assert them.'"*

In the later case of *McIntire* vs. *Pryor*, 173 U. S., 38, 54 and 55, the Court makes it manifest that owing to the very exceptional facts of this particular case, the relief was granted, but that it did not intend to recede from its general position with regard to laches and acquiescence, appears by the following:

" We have no desire to qualify in any way the long line of cases in this Court, too numerous even for citation, in which we have held that where the fraud is constructive or is proved by inconclusive testimony, or evidence falling short of conviction, and the property has greatly increased in value, great diligence will be required in the assertion of the plaintiff's rights. But these were all cases either of bills to establish a trust, to open settled accounts, bills not involving fraud, or where the fraud was not clearly proven, or where with knowledge of the facts the fraud had been deliberately acquiesced in, bills to impeach judicial proceedings, or where the property has passed into the hands of persons innocent of the fraud, or with no actual notice that a fraud had been committed."

The Circuit Courts and Courts of Appeal have been equally clear in holding to the same principle and doctrine.

A most excellent summary of the authorities bearing on this point is found in the suit of *Prince's Metallic Paint Co.* vs. *Price Manufacturing Co.*, reported in 57 Fed. Rep., p. 938, in which case, the Court denied complainant all relief on account of eight years' acquiescence. The Court says, at page 994 of said report, as follows:

"*Now, it is true that, where the plaintiff's title to a trademark is clear, mere delay unaccompanied by anything else, will not ordinarily bar a suit for injunction against a naked infringer. Fullwood* vs. *Fullwood, 9 Ch. Div., 176; McLean* vs. *Fleming, 96 U. S., 245; Menendez* vs. *Holt 128 U. S., 514, 9 Sup. Ct. Rep., 143. But we are dealing with no such case. In courts of equity the rule is to withhold relief where there has been unreasonable delay in prosecuting a claim, or long acquiescence in the assertion of adverse rights. Creath's Adm'r* vs. *Sims, 5 How., 192; Godden* vs. *Kimmell, 99 U. S., 201; Lansdale* vs. *Smith, 106 U. S., 391, 1 Sup. Ct. Rep, 350. Again and again it has been judicially declared that nothing can call into activity a a court of equity but "conscience, good faith and reasonable diligence." McKnight* vs. *Taylor, 1 How., 161; Sullivan* vs. *Railroad Co., 94 U. S., 806, 812. In McLaughlin* vs. *Railway Co., 21 Fed. Rep., 574, Judge Brewer held a bill for the infringement of a patent, alleging the unauthorized use and construction of a patented invention for 13 years, without stating an excuse for the plaintiff's delay in suing, to be demurrable. Laches for even less than the statutory period of limitations, aided by other circumstances, will bar a right. Ashhurst's Appeal, 60 Pa. St., 290, per Strong, J. In Lewis* vs. *Chapman, 3 Beav., 133, the Master of the Rolls refused an injunction to restrain the infringement of a copyright solely on the ground of six and a half*

years' delay, where there was knowledge of the commencement and prosecution of the defendant's publication. Long acquiescence before filing a bill for an injunction, with full knowledge of the infringement, is deemed laches equivalent to a breach of good faith. Browne, Trade-Marks, Sec. 497. Hence, in Manufacturing Co. vs. Garner, 55 Barb., 151, a delay of nine years in applying for an injunction to restrain infringement of a trademark was held to be good cause for refusing it."

In the suit of *Woodmanse Manufacturing Company* vs. *Williams*, 68 Federal Reporter, 489, 493, the Circuit Court of Appeals for the Sixth Circuit held, that fourteen years delay by a patent owner and his predecessors in interest, without making any attempt to assert their rights against an alleged infringing company openly engaged in making and selling a rival and competitive machine, was such laches as to require the dismissal of the Bill of Complaint.

It was further held that the knowledge and acquiescence of the former owners of a patent in an alleged infringement, has, in equity, the same effect upon an assignee's rights as his own neglect or acquiescence.

In the suit of *Richardson* vs. *D. M. Osborne & Co.* 82 Federal Reporter, page 95, the Circuit Court for the Northern District of New York, decided that a patentee who had acquiesced in the open and notorious infringement of his patent for sixteen years, could not maintain an action for such infringement, and that it was no excuse for the delay that co-owners of the patent would not agree to prosecute infringements.

The Circuit Court cites as authority for its holding, the following cases: *McLean* vs. *Fleming*, 96 U. S., 245; *Galliher* vs. *Caldwell*, 145 U. S., 368; *Menendez* vs. *Holt*, 128 U. S., 514; *Hardt* vs. *Heidweyer*, 152 U. S., 547; *Hammond* vs. *Hopkins*, 143 U.S. 524; *Lane & Bodley Co.* vs. *Locke*, 150 U.S.,

193; *Abraham* vs. *Ordway*, 158 U. S., 416; *Piatt* vs. *Vattier*, 9 Pet., 405; *Manufacturing Co.* vs. *Williams*, 15 C. C. A. 520; *Owen* vs. *Ladd*, 76, Fed., 992; *Wyeth* vs. *Stone*, 1 Story, 273; *Fosdick* vs. *Machine Shop*, 58 Fed., 817; *Keller* vs. *Stolzenbach*, 28 Fed. 81; *Prince's Metallic Paint Co.* vs. *Prince Manuf'g. Co.*, 6 C. C. A., 647; *New York Grape-Sugar Co.* vs. *Buffalo Grape-Sugar Co.*, 24 Fed., 604; *McLaughlin* vs. *Railway Co.*, 21 Fed., 574.

In the suits of *Starrett* vs. *Stevens Arms and Tool Company*, and *Same* vs. *Athol Machine Company*, 96 Federal Reporter, pp. 244-246, it was held that a delay of ten years by a patent owner after knowledge of an alleged infringement, was such laches as to debar, not merely the claim for profits, but any claim to the interposition of a Court of Equity.

In the very recent case of *Meyewitz* vs. *Eccleston*, 98 Federal Reporter, page 437, ten years' delay was held fatal to relief in a suit for infringement of a patent. The Court cites in support of its position the Supreme Court Case of *Lane & Bodley Co.* vs. *Locke*, 150 U. S., *Insurance Co.* vs. *City of Austin*, 168 U. S., 685, 697, and other authorities.

The above array and unbroken line of Federal decisions, when applied to the facts of this case, make any comment unnecessary and superfluous.

Minor Points.

It is claimed that Saxlehner's firm never intended to abandon or surrender their rights in the United States or elsewhere, and that this is manifested by the registration of trade-marks in the United States, and litigation in England and other countries.

As we have seen, the trade-mark of 1877 was not for the word "Hunyadi," but for "Hunyadi Janos," and Saxlehner could not have obtained registration here for the word "Hunyadi," as the name was generic in Hungary and substantially unknown here.

From 1877 to 1887, when the "Hunyadi" trade-mark was registered in the United States, the Hunyadi Janos water sold by the Apollinaris Company had met with no competition, and therefore in common parlance and by trade usage and custom *only*, had become known as "Hunyadi" water. In Hungary, the word "Hunyadi" was also generic.

It is obvious, therefore, that the only foundation for the registration, was the action of the Apollinaris Company in making the water known, and in selling it without competition up to that time. During the succeeding ten years, as the evidence shows, the word "Hunyadi" became generic in the United States, thereby depriving the registered trade-mark of all weight.

In England and other countries, with the exception of Hungary and the United States, no Hunyadi waters other than the Janos water, were imported or sold during the period of the Apollinaris contract, and therefore, in these countries, there being no competition, "Hunyadi" or "Eau de Janos" have been the alternative designations for Hunyadi Janos water.

With Reference to the English and Other Litigation.

In England, after the termination of its contract, the Apollinaris Company designated a spring owned by it in Hungary as "Apenta," devised a label and made a part thereof, the "Diamond Brand," which they had used on Hunyadi Janos water during the contract. On the label also appeared the words "Uj Hunyadi," meaning new Hunyadi. Suit was thereupon brought in England by the complainant to suppress the use of these words and the Diamond Brand on the Apenta label, on the ground that by the action of the Apollinaris Company during the period of the contract in using the said Diamond mark, and the fiduciary relations created by such

contract, the use of the Diamond mark and the word "Uj Hunyadi" should be suppressed. The English courts refused to grant an injunction against the use if the Diamond mark, but enjoined the Apollinaris Company from the use of the said words, on the ground of the fiduciary relations of the Apollinaris Company during the period of the contract, and because the word Hunyadi had never been lost in England, there being no substantial competition of other Hunyadi waters there, and the state of affairs being the exact opposite of the situation in the United States, where the sole and exclusive right to the word had been lost by acquiescence.

As to the claimed Accounting.

The counsel appears to urge that the petitioner is entitled to an accounting for profits and damages. We can hardly believe that this attempt is serious.

The delay of nine years in bringing suit, even if it had not been accompanied by the numerous acts of surrender, acquiescence and abandonment, would have been fatal in any event to an accounting under the decisions of *McLean* vs. *Fleming* 96 U. S., p. 245, and *Menendez* vs. *Holt*, 128 U. S., pp. 514–524.

The long list of authorities we have above cited, are also to the effect that in no event, under the circumstances and delay shown in the present case, could an accounting be granted.

As to the Siegel-Cooper, Marquet and Gies suits.

These suits were brought against the said defendants substantially for alleged palming off of Hunyadi Matyas water as and for Hunyadi Janos water.

The Court dismissed the bill in the Siegel-Cooper suit and granted injunctions against Marquet and Gies, restraining them from selling Hunyadi Matyas water as and for Hunyadi Janos water.

The defense of these suits was assumed by the Eisner Mendelson Company under the following circumstances:

In the fall of 1896 the complainant circulated very extensively among all persons interested in the sale of mineral waters, notices threatening suit against any one selling any other bitter water than Hunyadi Janos water under the name "Hunyadi," or using the red and blue label.

The Eisner & Mendelson Company replied by counter circulars, and guaranteed to defend all persons sued by complainant for the sale of Hunyadi Matyas water.

Under this guarantee, the defense of the Siegel-Cooper, Marquet and Gies suits was assumed by the said Company.

The Company assumed the defense of these suits on the assurance of the respective defendants that they had not palmed off Hunyadi Matyas water for Hunyadi Janos water as charged in the Bills of Complaint. Of course, the Eisner & Mendelson Company at the time was unaware of the complainant's evidence in regard to the matters in the suit.

If the Eisner & Mendelson Company had refused to defend these suits, the Company would have violated its guarantee, and, as in other instances where injunctions were obtained by default against the sale of other Hunyadi waters, the complainant would have published and exploited the fact that injunctions had been obtained against sellers of the Hunyadi Matyas water, if said suits had not been defended. In this way it is obvious that the sale of Hunyadi Matyas water would have been seriously injured.

It was for the above reasons that the Eisner & Mendelson Company assumed the defense of said suits.

The Eisner & Mendelson Company did not appeal from these decisions for the reason that the acts found as fraudulent by the Court were the acts of these defendants only, and, as we have stated, did not affect the legitimate sales of Hunyadi Matyas water in any way.

In conclusion, we would say that the facts which have been detailed above and which are in the main absolutely undisputed, show this cause to be, as the Court of Appeals finds, one of those exceptional cases, where delay and acquiescence has been continued so long and under such circumstances as to defeat any right to relief. We therefore contend that the decree of the Circuit Court of Appeals for the Second Circuit should be affirmed, and Petitioner denied the relief she seeks.

All of which is respectfully submitted.

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